Volume 7, No. 1, Pages 1 to 399,
December 30, 1991 - January 10, 1992

# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

# FEDERAL COMMUNICATIONS COMMISSION

**ALFRED C. SIKES, CHAIRMAN**

**James H. Quello**
**Sherrie P. Marshall**
**Andrew C. Barrett**
**Ervin S. Duggan**

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

**Citation Form: 7 FCC Rcd 1 (1992)**

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office on a subscription basis

# Federal Communications Commission Record

Volume 7
Issue 1

## Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... v

Table of Rulemaking Numbers..... vi

Table of Localities..... vii

Table by Subject Matter..... viii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 1

# Federal Communications Commission Record

## Table of Cases
## Volume 7
## Issue 1


| Case Name | Page |
|---|---|
| ALLTEL Service Corporation | 52 |
| AT&T Communications | 156 |
| AT&T Communications | 38 |
| Advanced Technology Cellular Telecommunications | 115 |
| Algreg Cellular Engineering | 18 |
| Amendment of Part 22 - Cellular Service | 251 |
| Amendment of Part 22 - Cellular Telephones/Cell Enhancers | 23 |
| Amendment of Part 63 - Telephone/Cable TV Cross-Ownership Rules | 300 |
| Amendment of Part 65 - Rate Base and Net Income | 296 |
| Amendment of Part 90 - Frequencies for Low-Power Mobile | 293 |
| Amendment of Parts 2, 22 and 25 - Mobile Satellite Service | 266 |
| Americall Systems of Louisville | 129 |
| American Network Exchange, Inc. | 163 |
| American Public Communications | 169 |
| American Telegraph and Telephone Company | 130 |
| American Telephone and Telegraph Company | 255 |
| American Telephone and Telegraph Company | 31 |
| American Telephone and Telegraph Company | 32 |
| American Telephone and Telegraph Company | 33 |
| American Telephone and Telegraph Company | 35 |
| American Telephone and Telegraph Company | 113 |
| American Telephone and Telegraph Company | 71 |
| American Telephone and Telegraph Company | 120 |
| American Telephone and Telegraph Company | 134 |
| American Telephone and Telegraph Company | 136 |
| American Telephone and Telegraph Company (ERRATUM) | 22 |
| Ameritech Operating Companies | 257 |
| Ameritech Operating Companies | 116 |
| Ascom Autelca Communications | 175 |
| Bay Communications | 254 |
| BellSouth Telephone Companies | 112 |
| Bernstein, Edwin A. | 37 |
| Cable and Wireless Communications, Inc. | 127 |
| Columbia Communications Corporation | 122 |
| Com Systems, Inc. | 67 |
| Communications Satellite Corp. | 50 |
| Communications Satellite Corporation | 149 |
| Competitive Telecommunications Association | 119 |
| Conquest Telecommunications, Inc. | 66 |
| Evaluation of the Syndication and Financial Interest Rules | 345 |
| Fee Decisions of the Managing Director | 280 |
| Fiberline Network Communications | 188 |

## FEDERAL COMMUNICATIONS COMMISSION


| Case Name | Page |
|---|---|
| Fone America, Inc. | 181 |
| GTE Hawaiian Telephone Company, Inc. | 147 |
| InterMart Broadcasting Gulf Coast, Inc. | 83 |
| Ju-Le Corporation | 194 |
| Kennedy Broadcasting, Inc. | 19 |
| Lawhorne, Thomas W. | 13 |
| MCI Communications Corporation | 128 |
| McCaw RCC Communications, Inc. | 76 |
| McCaw RCC Communications, Inc. | 77 |
| Midwest Cable and Satellite, Inc. | 151 |
| Midwest Communications, Inc. | 159 |
| Mobile Marine Radio, Inc. | 62 |
| NetExpress Communications, Inc. | 51 |
| One Call Communications, Inc. | 200 |
| Orkus, Judith O. and Larry R. | 20 |
| PCI Communications, Inc. | 63 |
| Pay Com, Inc. | 207 |
| Pilgrim Telephone, Inc. | 213 |
| Quests, Inc. | 29 |
| SEG Cellular Limited Partnership | 74 |
| Skidelsky, Barry | 1 |
| South Texas Phone, Inc. | 68 |
| Southeast Pay Telephone, Inc. | 219 |
| TRT/FTC Communications, Inc. | 252 |
| Table of Allotments, FM, Bixby, OK | 59 |
| Table of Allotments, FM, Christiansted, VI | 111 |
| Table of Allotments, FM, Dyersburg, TN and De Witt, AR | 60 |
| Table of Allotments, FM, Epworth and Dyersville, IA | 106 |
| Table of Allotments, FM, Gilmer, TX | 47 |
| Table of Allotments, FM, Grenada, Artesia and Okolona, MS | 56 |
| Table of Allotments, FM, Harrisburg and Albemarle, NC | 108 |
| Table of Allotments, FM, Houma and Chalmette, LA | 40 |
| Table of Allotments, FM, Jourdanton, TX | 43 |
| Table of Allotments, FM, Nassawadox, VA | 48 |
| Table of Allotments, FM, Trinity, TX | 39 |
| Table of Allotments, TV, Springdale, AR | 45 |
| TelTrust, Inc. | 69 |
| Telephone Operating Systems | 225 |
| U.S. Communications of Westchester | 237 |
| U.S. Fiberline Communications | 70 |
| U.S. Long Distance, Inc. | 73 |
| US Sprint Communications Company Limited Partnership | 148 |
| US West Communications | 55 |
| USA Payphone Systems | 231 |
| United Tele-Systems of Virginia | 244 |
| United Telephone Company of Indiana | 53 |
| Woods Communications Group, Inc. | 78 |

# Federal Communications Commission Record

## Table of Cases by Delegated Authority and FCC Number
## Volume 7
## Issue 1


| Delegated Authority or FCC Number | Page | Delegated Authority or FCC Number | Page |
|---|---|---|---|
| DA 91 -1499 | 255 | DA 91 -1623 | 112 |
| DA 91 -1575 | 31 | DA 91 -1624 | 251 |
| DA 91 -1576 | 32 | DA 91 -1626 | 22 |
| DA 91 -1577 | 33 | DA 91 -1628 | 119 |
| DA 91 -1578 | 35 | DA 91 -1629 | 116 |
| DA 91 -1579 | 39 | DA 91 -1630 | 120 |
| DA 91 -1580 | 40 | DA 91 -1631 | 38 |
| DA 91 -1581 | 43 | DA 91 -1632 | 52 |
| DA 91 -1583 | 156 | DA 91 -1633 | 257 |
| DA 91 -1586 | 45 | DA 91 -1634 | 50 |
| DA 91 -1587 | 29 | DA 91 -1635 | 51 |
| DA 91 -1588 | 47 | DA 91 -1636 | 63 |
| DA 91 -1589 | 48 | DA 91 -1638 | 56 |
| DA 91 -1590 | 53 | DA 91 -1639 | 59 |
| DA 91 -1594 | 128 | DA 91 -1640 | 60 |
| DA 91 -1595 | 127 | DA 91 -1642 | 111 |
| DA 91 -1596 | 129 | DA 91 -1643 | 106 |
| DA 91 -1598 | 55 | DA 91 -1644 | 108 |
| DA 91 -1600 | 163 | DA 91 -1647 | 252 |
| DA 91 -1601 | 169 | DA 91 -1648 | 147 |
| DA 91 -1602 | 175 | DA 91 -1649 | 148 |
| DA 91 -1603 | 181 | DA 91 -1650 | 149 |
| DA 91 -1604 | 188 | DA 91 -1651 | 151 |
| DA 91 -1605 | 194 | DA 92 - 2 | 62 |
| DA 91 -1606 | 200 | DA 92 - 4 | 280 |
| DA 91 -1607 | 207 | DA 92 - 9 | 254 |
| DA 91 -1608 | 213 | FCC 91 - 315 | 293 |
| DA 91 -1609 | 219 | FCC 91 - 324 | 296 |
| DA 91 -1610 | 225 | FCC 91 334 | 300 |
| DA 91 -1611 | 231 | FCC 91 - 336 | 345 |
| DA 91 -1612 | 237 | FCC 91 - 399 | 23 |
| DA 91 -1613 | 244 | FCC 91 - 415 | 159 |
| DA 91 -1614 | 73 | FCC 91 - 416 | 130 |
| DA 91 -1615 | 115 | FCC 91 - 418 | 134 |
| DA 91 -1616 | 66 | FCC 91 - 419 | 136 |
| DA 91 -1617 | 67 | FCC 91 - 422 | 78 |
| DA 91 -1618 | 68 | FCC 91 - 423 | 74 |
| DA 91 -1619 | 69 | FCC 91 - 425 | 76 |
| DA 91 -1620 | 70 | FCC 91 - 426 | 77 |
| DA 91 -1621 | 71 | FCC 91 - 427 | 266 |
| DA 91 -1622 | 113 | FCC 91 - 429 | 122 |

## FEDERAL COMMUNICATIONS COMMISSION


| Delegated Authority or FCC Number | Page |
|---|---|
| FCC 91R - 115 | 1 |
| FCC 91R - 116 | 13 |
| FCC 91R - 117 | 18 |
| FCC 91R - 118 | 19 |
| FCC 91R - 119 | 20 |
| FCC 91R - 120 | 37 |
| FCC 92D - 1 | 83 |

# Federal Communications Commission Record

## Table of Cases by Docket Number
## Volume 7
## Issue 1


| Docket Number | Page |
|---|---|
| CC Dkt.No.86 - 497 | 296 |
| CC Dkt.No.87 - 266 | 300 |
| CC Dkt.No.90 - 6 | 251 |
| CC Dkt.No.91 - 142 | 18 |
| CC Dkt.No.91 - 324 | 115 |
| CC Dkt.No.91 - 327 | 66 |
| CC Dkt.No.91 - 329 | 67 |
| CC Dkt.No.91 - 332 | 68 |
| CC Dkt.No.91 - 334 | 70 |
| CC Dkt.No.91 - 335 | 73 |
| CC Dkt.No.91 - 365 | 163 |
| CC Dkt.No.91 - 366 | 169 |
| CC Dkt.No.91 - 367 | 175 |
| CC Dkt.No.91 - 368 | 181 |
| CC Dkt.No.91 - 369 | 188 |
| CC Dkt.No.91 - 370 | 194 |
| CC Dkt.No.91 - 371 | 200 |
| CC Dkt.No.91 - 372 | 207 |
| CC Dkt.No.91 - 373 | 213 |
| CC Dkt.No.91 - 374 | 219 |
| CC Dkt.No.91 - 375 | 225 |
| CC Dkt.No.91 - 376 | 231 |
| CC Dkt.No.91 - 377 | 237 |
| CC Dkt.No.91 - 378 | 244 |
| GEN Dkt.No.84 - 1234 | 266 |
| MM Dkt.No.87 - 563 | 60 |
| MM Dkt.No.88 - 183 | 78 |
| MM Dkt.No.88 - 584 | 37 |
| MM Dkt.No.89 - 384 | 106 |
| MM Dkt.No.89 - 406 | 56 |
| MM Dkt.No.89 - 594 | 108 |
| MM Dkt.No.90 - 106 | 83 |
| MM Dkt.No.90 - 162 | 345 |
| MM Dkt.No.90 - 181 | 1 |
| MM Dkt.No.90 - 192 | 13 |
| MM Dkt.No.90 - 479 | 29 |
| MM Dkt.No.91 - 179 | 59 |
| MM Dkt.No.91 - 190 | 20 |
| MM Dkt.No.91 - 203 | 19 |
| MM Dkt.No.91 - 250 | 47 |
| MM Dkt.No.91 - 272 | 39 |
| MM Dkt.No.91 - 296 | 111 |
| MM Dkt.No.91 - 361 | 40 |
| MM Dkt.No.91 - 362 | 43 |
| MM Dkt.No.91 - 363 | 45 |
| MM Dkt.No.91 - 364 | 48 |
| PR Dkt.No.91 - 295 | 293 |

# Federal Communications Commission Record

## Table of Cases by Rulemaking Number
## Volume 7
## Issue 1


| Rulemaking Number | Page |
|---|---|
| RM - 6078 | 60 |
| RM - 6090 | 111 |
| RM - 6710 | 60 |
| RM - 6745 | 56 |
| RM - 6884 | 106 |
| RM - 7142 | 108 |
| RM - 7182 | 293 |
| RM - 7205 | 106 |
| RM - 7255 | 56 |
| RM - 7318 | 108 |
| RM - 7326 | 39 |
| RM - 7461 | 47 |
| RM - 7502 | 40 |
| RM - 7734 | 59 |
| RM - 7780 | 48 |
| RM - 7873 | 43 |
| RM - 7877 | 45 |

## Table of Cases by City
Volume 7
Issue 1


| City/State | Page |
|---|---|
| Albemarle, NC | 108 |
| Artesia, MS | 56 |
| Ashtabula, OH | 29 |
| Bixby, OK | 59 |
| Center Moriches, NY | 37 |
| Chalmette, CA | 40 |
| Christiansted, VI | 111 |
| Colorado Springs, CO | 76 |
| Colorado Springs, CO | 77 |
| Columbia, LA | 78 |
| De Witt, AR | 60 |
| Des Moines, IA | 74 |
| Dodgeville, WI | 106 |
| Dyersburg, TN | 60 |
| Dyersville, IA | 106 |
| Epworth, IA | 106 |
| Gilmer, TX | 47 |
| Grenada, MS | 56 |
| Harrisburg, NC | 108 |
| Heber Springs, AR | 60 |
| Houma, LA | 40 |
| Hoxie, AR | 60 |
| Jonesboro, AR | 60 |
| Jourdanton, TX | 43 |
| Martinez, GA | 19 |
| Nassawadox, VA | 48 |
| Newport, AR | 60 |
| Okolona, MS | 56 |
| Port Matilda, PA | 20 |
| Punta Rassa, FL | 83 |
| Queensbury, NY | 1 |
| Springdale, AR | 45 |
| Sylvester, GA | 13 |
| Trinity, TX | 39 |

| Subject | Page |
|---|---|
| Adjudication | |
| Administrative Law Judge Decision | |
| Character qualifications | 13 |
| Distribution of broadcast facilities | 78 |
| Integration of ownership into management, effectuation | 1 |
| Misrepresentation and lack of candor | 1 |
| Reopening of record | 1, 13 |
| Site availability or suitability | 1, 13 |
| Orders or Notices | |
| Translator | 83 |
| Broadcast Radio Services - General Rules | |
| Applications for authorization | |
| Amendment of applications | 20 |
| Conflicts in applications, agreement for removing | 20 |
| Licenses and permits | |
| Multiple ownership of broadcast stations in the same service | 159 |
| Operating hours | |
| Discontinuation | 29 |
| Schedule | 29 |
| Broadcasting - FM Stations | |
| Allotments and assignments | |
| Allotments, table of | 39, 40, 43, 47, 48, 56, 59, 60, 111, 106, 108 |
| Broadcasting - TV Stations | |
| Allocations/assignments/licenses | |
| Antenna site precludes licensing, exclusive use of | 159 |
| Table of assignments | 45 |
| Carriers: Service Altered | |
| Extensions and supplements | |
| Applications, contents of | 50, 51, 63, 136, 147, 148, 149, 151, 252 |
| Commission Organization | |
| Delegations of authority - Chief, Common Carrier Bureau | |
| Limitations on delegated authority | 255, 257, 116, 119, 120, 22, 55 |

## FEDERAL COMMUNICATIONS COMMISSION


| Subject | Page |
|---|---|
| Communications Act of 1934 | |
| Common Carriers | |
| Extension of lines, certificate for | 50, 63, 136, 147, 148, 149, 151, 252 |
| Service and charges | 62 |
| Radio, provisions relating to | |
| Applications;form of and conditions attached to licenses | 122 |
| Construction permits | 122 |
| Licenses and conditions for foreign communication, applications | 122 |
| Sanctions, administrative | 29 |
| Practice and Procedure | |
| Common carriers: applications under Title II Act | |
| Licenses, cable landing | 130, 134 |
| Common carriers: complaints, informal | |
| Procedure | 254 |
| Proceedings, miscellaneous | |
| Forfeiture proceedings | 37, 76, 77 |
| Revocation/cease and desist proceedings/hearings, procedures in | 29, 29 |
| Reconsideration/review of Commission action | |
| Reconsideration of a final FCC action, petition for | 18, 19 |
| Public Mobile Service | |
| Applications and licenses-filing requirements | |
| Communications by radio, authorization required | 76 |
| Domestic public cellular radio telecommunications service | |
| Service areas | 251 |

# TABLE OF STATUTORY AND RULE PROVISIONS


Page

001.006 Petition for Reconsideration ..... 29
001.080 Forfeiture proceedings. ..... 74
001.080 Forfeiture proceedings. ..... 76
001.080 Forfeiture proceedings. ..... 77
001.091 Revocation Proceedings; Hearings ..... 29
001.092 Revocation after Waiver of Hearing ..... 29
001.106 - Reconsideration Denied ..... 18
001.106 Petition for Reconsideration, Dismissed ..... 19
001.177 Formal or informal complaints ..... 127
001.177 Formal or informal complaints ..... 128
001.177 Formal or informal complaints ..... 129
001.177 Formal or informal complaints ..... 38
001.717 Informal Complaints; Procedure ..... 254
001.718 Unsatisfied informal complaints ..... 254
001.767, Cable Landing Licenses ..... 130
001.767, Cable Landing Licenses ..... 134
001.800 Forfeiture Proceedings ..... 37
022.003 Authorization required. ..... 74
022.003 Authorization required. ..... 76
022.003 Authorization required. ..... 77
022.911 Permissible communications ..... 23
022.930 Special provisions for alternative cellular technolo ..... 23
063.001 Contents of Application ..... 51
063.001 Contents of Application ..... 63
063.001 Contents of Application ..... 147
063.001 Contents of Applications ..... 136
063.001 Contents of Applications ..... 148
063.001 Contents of Applications ..... 149
063.001 Contents of Applications ..... 151
063.001 Contents of Applications ..... 252
063.01 Contents of Application ..... 50
073.1740 Minimum Operating Schedule ..... 29
073.1750 Discontinuance of Operation ..... 29
073.202 FM Table of Allotments ..... 40
073.202 FM Table of Allotments ..... 43
073.202 FM Table of Allotments ..... 47
073.202 FM Table of Allotments ..... 48
073.202 FM Table of Allotments ..... 56
073.202 FM Table of Allotments ..... 59
073.202 FM Table of Allotments ..... 60
073.202 FM Table of Allotments ..... 106
073.202 FM Table of Allotments ..... 108
073.202 FM Table of Allotments ..... 111
073.3522 Amendment, Accepted ..... 20
073.3525 Settlement Agreement, Approved ..... 20
073.3555 Multiple Ownership ..... 159
073.606 TV Table of Allotments ..... 45
073.635 Use of Common Antenna Site ..... 159
300.201 Service and Charges ..... 62
300.202 Discrimination and Preferences ..... 62

300.214 Extension of Lines ..... 50
300.214 Extension of Lines ..... 51
300.214 Extension of Lines ..... 63
300.214 Extension of Lines ..... 136
300.214 Extension of Lines ..... 147
300.214 Extension of Lines ..... 148
300.214 Extension of Lines ..... 149
300.214 Extension of Lines ..... 151
300.214 Extension of Lines ..... 252
300.303 General Powers of Commission ..... 266
300.308, Application for Licenses; Cond. in License for Fore ..... 122
300.309 Action Upon Applications; Form of and Conditions ..... 266
300.309, Actions Upon Appls., Form and Conds. Attached to Li ..... 122
300.312 Administrative Sanctions ..... 29
300.319, Construction Permits ..... 122
300.34, Cable Landing License Act ..... 130
300.34, Cable Landing License Act ..... 134
300.402 Proceedings to Enjoin, Set Aside, Annul, or Suspend ..... 266
47 C.F.R. Section 0.291 delegated authority ..... 22
47 C.F.R. Section 0.291 delegated authority ..... 31
47 C.F.R. Section 0.291 delegated authority ..... 32
47 C.F.R. Section 0.291 delegated authority ..... 33
47 C.F.R. Section 0.291 delegated authority ..... 35
47 C.F.R. Section 0.291 delegated authority ..... 55
47 C.F.R. Section 0.291 delegated authority ..... 66
47 C.F.R. Section 0.291 delegated authority ..... 67
47 C.F.R. Section 0.291 delegated authority ..... 68
47 C.F.R. Section 0.291 delegated authority ..... 69
47 C.F.R. Section 0.291 delegated authority ..... 70
47 C.F.R. Section 0.291 delegated authority ..... 71
47 C.F.R. Section 0.291 delegated authority ..... 73
47 C.F.R. Section 0.291 delegated authority ..... 112
47 C.F.R. Section 0.291 delegated authority ..... 113
47 C.F.R. Section 0.291 delegated authority ..... 115
47 C.F.R. Section 0.291 delegated authority ..... 116
47 C.F.R. Section 0.291 delegated authority ..... 119
47 C.F.R. Section 0.291 delegated authority ..... 120
47 C.F.R. Section 0.291 delegated authority ..... 156
47 C.F.R. Section 0.291 delegated authority ..... 163
47 C.F.R. Section 0.291 delegated authority ..... 169
47 C.F.R. Section 0.291 delegated authority ..... 175
47 C.F.R. Section 0.291 delegated authority ..... 181
47 C.F.R. Section 0.291 delegated authority ..... 188
47 C.F.R. Section 0.291 delegated authority ..... 194
47 C.F.R. Section 0.291 delegated authority ..... 200
47 C.F.R. Section 0.291 delegated authority ..... 207
47 C.F.R. Section 0.291 delegated authority ..... 213
47 C.F.R. Section 0.291 delegated authority ..... 219
47 C.F.R. Section 0.291 delegated authority ..... 225
47 C.F.R. Section 0.291 delegated authority ..... 231
47 C.F.R. Section 0.291 delegated authority ..... 237
47 C.F.R. Section 0.291 delegated authority ..... 244
47 C.F.R. Section 0.291 delegated authority ..... 255
47 C.F.R. Section 0.291 delegated authority ..... 257

47 CFR § 69, Access Charges ..... 53
500.005 - Integration, Qualitative ..... 83
500.170 - Financial Qualifications ..... 83
500.3040 Integration of ownership into management, questions ..... 1
500.3085 Integration of ownership into mgt., quantitative ..... 78
500.3086 Integration of ownership into mgt., effectuation ..... 78
500.3095 Character Qualifications ..... 13
500.3125 Misrepresentation and lack of candor ..... 1
500.3139 Programming, past ..... 78
500.3180 Site availability or suitability ..... 1
500.3180 Site Availability or Suitability ..... 13
500.3200 Reopening of record ..... 1
500.3200 Reopening of Record ..... 13
73.202 FM Table of Allotments ..... 39
Section 22.2 unserved area ..... 251
Section 22.903 Cellular geographic service area ..... 251
Section 22.925 filing of updated system information ..... 251
Use of cellular telephones in aircraft and cell enhances in ..... 23

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-181**

In re Applications of

BARRY SKIDELSKY File No. BPH-870819MO

BRADMARK BROADCASTING COMPANY File No. BPH-870819MT

NORMANDY BROADCASTING CORPORATION File No. BPH-870819NK

For Construction Permit for
New FM Station, Channel 289B1,
Queensbury, New York

**Appearances**

*Barry Skidelsky, pro se*; *David Tillotson* on behalf of Bradmark Broadcasting Company; *Jerome S. Boros* and *Jerome S. Silber* on behalf of Normandy Broadcasting Company; and *Y. Paulette Laden* on behalf of Chief, Mass Media Bureau.

**DECISION**

**Adopted: December 12, 1991; Released: January 2, 1992**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. Under review is the *Initial Decision* (*I. D.*) of Administrative Law Judge Edward J. Kuhlmann (ALJ), 6 FCC Rcd 2221 (1991), granting the application of Bradmark Broadcasting Company (Bradmark) for a new FM station on Channel 289B1 in Queensbury, New York. The opposing applicants, Barry Skidelsky (Skidelsky) and Normandy Broadcasting Corporation (Normandy),filed Exceptions; and Skidelsky, Bradmark, and the Commission's Mass Media Bureau replied to those Exceptions.[1] Oral argument was held August 16, 1991.

2. Originally, six applicants for this new FM station were designated for hearing on March 15, 1990. *Faye M. Brennan*, 5 FCC Rcd 2690 (1990) (*Hearing Designation Order*). Three subsequently were dismissed. A year ago, on October 16-19, 1990, the ALJ conducted a hearing with respect to the three remaining applicants, Bradmark, Skidelsky, and Normandy, on the following issues:

1. To determine whether Bradmark misrepresented, withheld evidence and/or lacked candor in its representations to the Commission about who holds ownership interests in the applicant and, if so, whether Bradmark should be disqualified.

2. (a) To determine whether Normandy engaged in misrepresentation, or was lacking in candor, when it certified in its application that it had reasonable assurance of a transmitter site.

(b) To determine in light of the evidence adduced under the foregoing issue whether Normandy is qualified to be a Commission licensee.

3. (a) To determine whether Normandy engaged in material misrepresentations in its Threshold Showing Concerning Broadcast Record.

(b) To determine in light of the evidence adduced under the foregoing issue whether Normandy is qualified to be a Commission licensee.

4. To determine whether Normandy has an unusually poor broadcast record with respect to station WYLR(FM).

5. (a) To determine whether Normandy misrepresented and/or lacked candor in its representations to the Commission about who has ownership interests in the applicant.

(b) To determine with regard to (a) whether Normandy's certification of its integration and diversification statement is false and whether Normandy abused the Commission's processes.

(c) To determine whether, in light of the foregoing issues, Normandy is qualified to be a Commission licensee.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

*I. D.*, para. 1.

3. The ALJ concluded that Bradmark did not misrepresent, intentionally withhold evidence, or lack candor regarding a warrant (and its attendant "put and call" feature) to acquire 27% of Bradmark's stock now held by AT&T Commercial Credit, Inc. (AT&T). By contrast, and in decisional respects, the ALJ determined that Normandy did not have "reasonable assurance" for its initial transmitter site; that its "threshold showing" on its non-entertainment programming was carelessly prepared, could not be relied upon, and was untruthful in material portion; and that it failed to report a contingent ownership interest, and its explanation for the failure was disingenuous. The ALJ, thus, determined that Normandy was disqualified to operate the facility "because it has not established that it can be relied on to provide truthful information to the Commission." *I. D.* at para. 73. As to the two basically qualified applicants, Bradmark and Skidelsky, the ALJ found parity on *quantitative* integration proposals, but that Bradmark was superior *qualitatively*, in addition to the superiority of its signal coverage proposal. We affirm the grant of the Construction Permit to Bradmark.

**BRADMARK**

4. *Misrepresentation.* The circumstances leading to the addition of a misrepresentation issue against Bradmark are as follows. Bradmark is a New York corporation with one class of voting stock held by Donald W. and Betty Jean Heckman as joint tenants. They are the sole officers and directors of Bradmark; Donald Heckman is President and Treasurer and Betty Jean Heckman is Vice President and Secretary. During the summer of 1988, Bradmark borrowed from Pacificorp Credit, Inc. (Pacificorp); and, in return, Bradmark issued a warrant, convertible to 20% of Bradmark's common stock. Bradmark Hearing Exhibit 1, Exhibit A. On April 24, 1989, a revised warrant was issued, giving Pacificorp the right to 27% of Bradmark's stock. *Id.*, Exhibit B. A related "put and call" agreement attached, under which the lender was granted the right (the "put") to require Bradmark to purchase the warrant for a price determined by a formula set forth in the agreement, while Bradmark was granted the prior right (the "call") to purchase the warrant for a price determined by the same formula. Bradmark Hearing Exhibit 1. It was Bradmark's alleged understanding that the sole reason that Pacificorp required Bradmark to issue the warrant was "to enable Pacificorp to earn a greater return on its loans to Bradmark, commensurate with the level of risk that Pacificorp had taken in connection with those loans, in the event that Bradmark was successful in increasing the value of its business"; and, more importantly, "that Pacificorp had no interest in, or intention of, actually exercising the . . . warrant, unless such exercise was necessary in order to enable Pacificorp to realize the extra return on its loans represented by the warrants . . . ." *Id.*, at 3. On January 31, 1990, Pacificorp assigned its rights to AT&T. Bradmark claimed a similar "understanding" with AT&T.

5. On July 13, 1990, all applicants for the new FM station in Queensbury, New York were required to file Integration and Diversification of Ownership Statements, which were to include "copies of agreements that may result in changes in ownership, such as . . . a loan agreement providing for a conversion of debt to ownership." *Order*, FCC 90M-1957, released July 5, 1990.[2] The applicants also were required to describe "oral" agreements that affected control. *Id.* Further, the Statement and the documents were required to be certified by a principal of each applicant. *Id.* Although Donald Heckman signed Bradmark's Statement, he did not attach copies of the warrant (or the "put and call" agreement), nor did he describe his oral understanding with AT&T. According to Heckman, he did read the ALJ's *Order* ; and, in fact, it was explained to him by counsel.

6. Bradmark was also required to produce documents relating to potential ownership pursuant to a separate document production order. *Memorandum Opinion and Order*, FCC 90M-2544, released August 16, 1990 (ALJ). While Heckman likewise reviewed the document request with counsel, he did not initially produce the warrant documents. However, certain other corporate documents were produced that plainly reference the warrant documents; and the production of those underlying corporate documents ultimately led to inquiry at Heckman's deposition, and later to the production of the actual warrant documents. As a result of Bradmark's failure to identify and produce the warrant documents, however, the ALJ designated the issue "to determine whether Bradmark misrepresented, withheld evidence and/or lacked candor in its representations to the Commission about who holds ownership interests in the applicant." *Order*, FCC 90M-3195, released October 9, 1990 (ALJ) at para. 6.

7. At hearing, Donald Heckman testified that he had not identified or attached the warrant documents to Bradmark's Integration Statement because he believed they represented merely "an opportunity for my lender to get extra money when and if the stations were sold." Tr. 359. Heckman further believed that, because Bradmark had the right to purchase the warrant, thereby foreclosing AT&T from obtaining stock, there was little likelihood that AT&T would obtain an interest in Bradmark. *I. D.*, para. 47. He claims to have reached this conclusion from explanations of the loan transaction provided by Bruce Carr, local counsel, and Stephen J. Turpin, Jr., Vice President and Manager of the Media Finance Group at the original lender, Pacificorp (and subsequently Vice President-Media Finance Group of AT&T). Tr. 360. Despite the fact that Heckman believed that the warrant was unlikely to be exercised, he did testify at hearing that he is aware that, if AT &T exercised the warrant and received stock, Bradmark's integration credit would be reduced, Tr. 374-75, a possibility he discussed with his wife. *See I. D.*, para. 6.

8. AT&T's Turpin also testified at hearing, Tr. 478-544, and his testimony coincided with Heckman's testimony. Turpin averred that the purpose of the warrant was to ensure a greater return on the loan to Bradmark than would otherwise be permitted by New York State lending laws, since AT&T was taking a greater risk. Tr. 497.[3] Turpin further testified that both Pacificorp and AT&T had repeatedly advised Heckman that they did not intend to exercise the warrant or obtain an ownership interest in Bradmark. Tr. 503, 506. Finally, Turpin testified that if AT&T did exercise the warrant, it would be contrary to its agreement with the borrower. Tr. 506.

9. After reviewing all of the evidence, the ALJ concluded that Bradmark's failure to report the warrant documents did not reflect misrepresentation, intentional withholding of evidence, or lack of candor. In relevant part, the ALJ stated:

> There is no question that Bradmark should have reported the warrant but when all the facts are assessed, it does not lead to the conclusion that Bradmark intentionally misrepresented its ownership interest or intentionally withheld AT&T's interest from scrutiny. In fact, although Bradmark did not produce the loan documents with its integration statement, when a joint request for documents was made, Mr. Heckman obtained what he believed were all the corporate documents from his local counsel, Bruce Carr, with the intention that the documents should be provided to the other parties. He was not aware that the loan documents were not included in the corporate folder he obtained from Mr. Carr. And through that production, corporate records, which reflected the existence of the warrants and the put and call agreement were produced, but not the loan agreements. Furthermore, when Mr. Heckman was questioned about them at his deposition, he immediately produced them and was questioned about them.

*I. D.*, at para 47. The ALJ acknowledged that "the possibility exists that Mr. Heckman deliberately withheld from the Commission the existence of AT&T's interest to avoid any impact on Bradmark's comparative proposal," but he viewed that as an "unlikely possibility on this record." *Id.*, at para. 48. The ALJ relied upon Turpin's testimony that AT&T had no interest in obtaining the Bradmark stock, and on his judgement that it was unlikely that AT&T would want to obtain the stock, since the Heckmans would retain control.

10. Skidelsky raises numerous arguments in excepting to the ALJ's conclusion on this issue. Skidelsky contends: (1) that it is incredible that Heckman would not have discussed the warrant, and the need to produce it, with counsel; (2) that Turpin's testimony was incredible and he had a motive to testify in a light favorable to Bradmark; (3) that Bruce Carr, Bradmark's local counsel, should have testified; (4) that the ALJ improperly relied upon an alleged "oral agreement" between the lenders and Bradmark; (5) that AT&T is the real-party-in-interest; (6) that Bradmark does not know how it could extinguish its debt if it were required to do so; (7) that the circumstances surrounding Bradmark's failure to report this ownership information are practically identical to those surrounding Normandy's failure to report certain ownership information, and therefore, Bradmark (like Normandy) should be disqualified; and (8) that Bradmark failed to identify and produce other ownership-related documents.

11. In response, Bradmark contends that though it initially failed to identify and provide the warrant documents, once that omission was realized it was corrected. Bradmark asserts that the lack of intentional deceit is further evidenced by several facts: (1) Bradmark voluntarily produced the corporate documents that referenced the warrant documents; (2) Heckman candidly testified at deposition (and at hearing) regarding the same; and (3) Turpin testified at hearing, corroborating Heckman's version. Bradmark submits that the ALJ, who had the opportunity to view the demeanor of both Donald Heckman and Turpin, credited their testimony. Finally, Bradmark submits that collateral facts also lend credibility to Heckman and Turpin's testimony, *e.g.*, the fact that even if AT&T exercised its right under the warrant, it would still not gain control of Bradmark.

12. *Discussion*. There is no question that Bradmark violated the Commission's reporting requirements in failing to initially produce the warrant documents for its opponents. Where information is required to be reported, a significant failure invariably raises questions of intent. *Edwin A. Bernstein*, FCC 91R-105, released November 20, 1991, *citing David Ortiz Radio Corp. v. FCC*, No. 90-1412 (D.C. Cir. August 20, 1991). In the aforecited cases, further exploration of significant reporting failures was demanded. Here, the ALJ did add and try a truthfulness issue against Bradmark on the failure. The key inquiry is, of course, one of intent, since "it is well-established that the mere existence of an'error without any indication that the [applicant] meant to deceive the Commission does not elevate the mistake to the level of an intentional misrepresentation.'" *Valley Broadcasting Co.*, 4 FCC Rcd 2611, 2615 (Rev. Bd. 1989)(subsequent affirmance omitted), *citing George E. Cameron Jr. Communications*, 91 FCC 2d 870, 989-99 (Rev. Bd. 1982).

13. We will not disturb the ALJ's conclusion for several reasons. First, while Bradmark did not initially supply the warrant documents themselves, it did immediately supply corporate documents that clearly adverted to the warrants as well as the "put and call" feature. Thus, it supplied a document entitled "Unanimous Written Consent of the Board of Directors of Bradmark Broadcasting Company, Inc.," part of which read:

> RESOLVED, that the Corporation enter into a Put and Call Agreement (the "Put and Call Agreement") with the Lender pursuant to which if any warrants are issued to the Lender *as provided in the Loan Agreement* the Lender shall have the right under certain circumstances to sell the warrants and the Corporation shall have the right under certain circumstances to call the warrants, which Put and Call agreement is to be substantially in the form of that presented to this meeting, with such changes in the text . . . .

*See* Skidelsky Exhibit 4 (emphasis added).[4] In *Omaha Channel 54 Broadcasting Group, Limited Partnership*, 3 FCC Rcd 870 (Rev. Bd. 1988) *review denied*, 3 FCC Rcd 6136 (1988), an applicant's corporate structure itself was unclear; but we there found that because the applicant had "openly and promptly exchanged its Articles of Incorporation, . . . we can hardly charge it with either misrepresentation or lack of candor." *Id.*, at n.3. Similarly, here, Bradmark promptly produced the documents in question.

14. Second, the ALJ heard both Heckman and Turpin's testimony that there was never an intention on the part of the warrant holder to exercise the warrant, but that it existed merely as a mechanism to skirt the New York State usery laws (*see supra* note 3). As we have stated many times, the Board is generally enjoined to defer to the credibility findings of an ALJ. *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987)(subsequent history omitted), and it does so regularly where the record evidence supports those findings. *See e.g., Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700-03 (Rev. Bd. 1990)(subsequent history omitted); *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960, 1964 (Rev. Bd. 1990), *aff'd* , 5 FCC Rcd 7651 (1990); *Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); *Tri - State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1169-73 (Rev. Bd. 1990)(subsequent history omitted); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 927 (Rev. Bd. 1991). We find such evidence here and do not overturn the credibility findings.

15. Finally, and in response to Skidelsky's demand that AT&T be regarded as a real-party-in-interest to the Bradmark application, we observe that the case law has rather consistently held that convertible interests will not affect the ownership/integration analysis unless there appears to be a likelihood that the interests will be converted. Hence, in *Channel 32 Broadcasting Company*, 5 FCC Rcd 7373, 7376-77 (Rev. Bd. 1990) *recon. denied*, 6 FCC Rcd 872 (1991), *modified*, FCC 91-271, released September 4, 1991,[5] we stated:

> In *Signal Ministries, Inc.*, . . . . the Board rehearsed the long-standing doctrine that "[w]here . . . it is *unlikely* that a convertible interest will be exercised, the potential ownership interest will have no impact on the comparative analysis." 104 FCC 2d at 1491

> (emphasis added) (*citing Washington's Christian TV Outreach, Inc.*, 99 FCC 2d 395, 410-414 (Rev. Bd. 1984) (subsequent affirmances omitted)).
>
> In *Signal Ministries* and *Washington's Christian*, we did forbear from attributing equity interests convertible to active status because the preponderance of record evidence in each specific case persuaded us that conversion was unlikely for the (then) forseeable future.

*Cf. Doylan Forney, supra*, 5 FCC Rcd at 5427-28.

16. Whereas the question of conversion "likelihood" is always somewhat speculative, and the burden is on the applicant to show that the likelihood of conversion is remote, we will not upend the *I. D.* on this aspect. One, an officer for the warrant holder, Turpin, testified under oath that it was never the intention of the warrant holder to exercise the warrant, and that "understanding" was repeatedly communicated to Bradmark.[6] Two, the "put and call" agreement does enable Bradmark to extinguish AT&T's purchase rights. In that regard, Skidelsky argues that Bradmark's "call" option is of dubious value in forefending any AT&T assault on Bradmark stock, since Bradmark once defaulted on a loan payment (December, 1988), and thus lacks the financial muscle to pin AT&T. Skidelsky Exceptions at 30. At the same time we reflect (as Skidelsky does not) that (a) Bradmark negotiated a deferral at that point; and (b) the default occassioned no conversion, the very point at issue. And three, AT&T, like its predecessor Pacificorp, has thus far taken no actions inconsistent with those of a passive lender.[7]

17. Applying the *Signal Ministries* standard, we will not overturn the ALJ's determination that Bradmark has demonstrated the unlikelihood of an AT&T conversion. Although the Board has not hesitated to reduce integration credit where an applicant's ownership share might soon diminish because of a pre-existing equity agreement, 104 FCC 2d at 1497-98 n.16; *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1057-58 (Rev. Bd. 1986)(option holder shown likely to exercise) *settled, sub nom. Evergreen Broadcasting Co.*, 4 FCC Rcd 8224 (1989), *vacated*, 6 FCC Rcd 1606 (1990), *modified*, 6 FCC Rcd 5599 (1991); *cf. George Henry Clay*, 5 FCC Rcd 317, 319-20 (Rev. Bd. 1989)(integration credit denied where applicant principal unlikely to acquire equity share), *recon. denied sub nom. Alabama Radio Movement, Inc.*, 5 FCC Rcd 2997 (1990), we find the Bradmark/AT&T situation to be a reasonable "integration" analogue to *Doylan Forney*, where an applicant received no "diversification" demerit simply because one of its principals was the director of a lender which, in turn, held warrants convertible to stock in several other broadcast stations. Citing *Signal Ministries*, the Commission there found no likelihood that the warrants would be converted and it assessed no comparative penalty. 5 FCC Rcd at 5427-28.

18. In finding that Bradmark did not misrepresent, lack candor, or intend to deceive, we reject Skidelsky's contentions regarding the warrant documents. To the extent that Skidelsky argues that the ALJ improperly relied upon an oral agreement between the lenders and Bradmark, Skidelsky lobbies for a strict application of the parol evidence rule, which excludes extrinsic evidence to vary the terms of a written instrument. Skidelsky Exceptions at 19-21. At the same time, the parties' mutual interpretation of an agreement is customarily favored. *See* WILLISTON ON CONTRACTS, THIRD EDITION, 623. Thus, we conclude that the ALJ did not err in relying upon Bradmark's "understanding" with its lenders. *See Washington's Christian, supra*, 99 FCC 2d at 413.

19. Skidelsky also argues that the circumstances surrounding Normandy's failure to report ownership information are almost identical to those surrounding Normandy's failure to report such information, and since Normandy was found unqualified on this basis, Bradmark too should be found unqualified. Skidelsky Exceptions at 8-12. The Board, however, does not reach the reporting issue against Normandy, because we find Normandy lacked reasonable assurance for its transmitter site and is unqualified on that basis alone. We, nevertheless, find the following language in the *I. D.* instructive:

> Mr. Lynch's failure to report a contingent ownership interest would not, standing alone, disqualify Normandy but his explanation of why he acted as he did is inconsistent with reliable, trustworthy behavior. He knew or should have known that the ownership agreement needed to be produced but he did not produce it. *When this incident is considered with his behavior in certifying Normandy's antenna site and the multiple misrepresentations in its Threshold Showing on programming, it is evident that the Commission can not rely on Normandy's representations in this proceeding and that there is a substantial likelihood that Normandy will not make a trustworthy licensee. Normandy has failed to meet its burden on these issues; it is not qualified.*

*I. D.*, at para. 62 (emphasis supplied).

20. Lastly, Skidelsky questions Bradmark's financial ability to extinguish the warrant. Skidelsky states that, "Bradmark lacks any ability to extinguish or thwart the exercise of the warrant, or put by its lender or any subsequent assignee." Skidelsky Exceptions at 31. However, in the following sentence Skidelsky more accurately states that "Bradmark has not inquired, nor is it aware, of any lender or equity sources available to it with sufficient funds so that Bradmark could extinguish or thwart the exercise of the warrant . . . ." *Id.* Thus, Skidelsky points to no solid evidence that Bradmark could not later arrange funding to thwart the exercise of the warrant. Under these circumstances, we cannot speculate at this stage that Bradmark would be unable to preclude the exercise of the warrant.

21. *Post-I. D. Pleadings.* Also under review are various pleadings against Bradmark submitted by Skidelsky subsequent to the release of the *I. D.* These include: a Petition To Enlarge Issues, filed May 22, 1991; a Motion To Compel Disclosure, filed May 22, 1991; a Petition To Enlarge Issues, filed August 15, 1991, and a Motion For Production of Documents, filed August 15, 1991. Bradmark has opposed these pleadings. In turn, Skidelsky has responded to Bradmark's opposition.[8] The Board recently stated in another case that:

> [we have] been recently deluged with *post*-oral argument filings in numerous proceedings. Henceforth, the Board will follow the example of the Commission and summarily dismiss any pleading seeking to argument exceptions or to raise new matter, *cf. Texas Communications Limited Partner-*

> *ship*, 6 FCC Rcd 5191, 5194 n.1 (1991); *Sharron Annette Haley*, 6 FCC Rcd 4630 n.1 (1991), unless the pleading meets the standards of Section 1.229 of the Rules. *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 (1991).

*Edwin A. Bernstein*, FCC 91R-105, released November 20, 1991 at n.1. Some of the unauthorized Skidelsky pleadings were filed prior to oral argument, but we treat on the "merits," as we must, *Great Lakes*, only the petitions to enlarge (*see supra* note 8).

22. *May 1991 Petition To Enlarge*. In his first petition, Skidelsky seeks the addition of a misrepresentation and/or candor issue against Bradmark based on a perceived inconsistency between the hearing testimony of Donald Heckman and his alleged comments to reporter Barbara Ballman of the *Capital District Business Review*, as revealed in her article "Bradmark Wins Round 1 In Tough License Fight," published during the week of May 6-12, 1991. According to Skidelsky, Heckman testified at hearing that he "had discussed Bradmark's Queensbury application with a broker (Media Venture Partners or MVP) and potential buyers," citing to, among other things, Tr. 338-39, but that Heckman stated for publication that "he had not yet spoken with any potential buyers for Bradmark's existing local AM/FM radio stations." May 1991 Petition, at 2. Skidelsky attaches his own Declaration and a copy of the Ballman article, but fails to include a signed Declaration from Ballman. Skidelsky admits that his allegation relies on hearsay, and he explains that he "has been unsuccessful in obtaining a Declaration signed by the subject article's author, Ms. Ballman . . . [because] her publisher . . . refused to allow her to do so." *Id.*, at 3. He contends, nonetheless, that because the reporter has accurately reported Heckman's statements in prior articles, "Mr. Heckman has likely been quoted accurately again." *Id.*, at 4. Skidelsky concludes that, "given these circumstances, the ends of justice will be better served by relaxing the formal rules of evidence and allowing any hearsay in order to support adding the requested issues, as permitted pursuant to Section 1.351 of the Commission's rules." He also submits that "good cause" has been shown for a waiver of Section 1.3 of the Rules. *Id.* In the alternative, he requests that the Board reopen and remand the proceeding to the ALJ with instructions to subpoena the reporter, to allow additional discovery, and to conduct further hearing pursuant to Section 1.276 (c).

23. Bradmark responds that the petition is based on insufficient evidence, citing Section 1.229 (d). Bradmark also states that:

> [w]hatever statements that Mr. Heckman made to the reporter who wrote the article were in the context of an interview regarding the *Initial Decision* and what steps, if any, Bradmark had taken to comply with the divestiture condition attached to the grant of Bradmark's application. In this context, there would have been no reason for Mr. Heckman to have referred to unsuccessful efforts that he had made to sell Bradmark's existing stations which ended in the Fall of 1989.

Bradmark Opposition, *supra* note 8, at 2-3 (footnote omitted). Bradmark further pleads that Skidelsky knows Heckman's testimony to be truthful because, among other things, he had obtained a copy of the sales presentation materials from Bradmark's broker, MVP, as well as an earlier-filed Declaration of a MVP partner which confirmed "the facts regarding MVP's efforts to sell the stations on behalf of Bradmark." *Id.*, at 3.

24. Skidelsky replies that Bradmark's opposition contains no Declaration from its principal, Donald Heckman, as required by the Commission's Rules; that Skidelsky does not necessarily know that Heckman was truthful simply because Skidelsky cross-examined Heckman; and that Bradmark's efforts to sell its existing station did not end in the Fall of 1989, as alleged by Heckman.

25. *August 1991 Petition To Enlarge*. In his second petition, Skidelsky again seeks a misrepresentation and/or candor issue against Bradmark but this time based on a telephone conversation with a "Mr. William Kayo" on August 13, 1991. According to Skidelsky, he learned during that call that Bradmark has been negotiating with Kayo for the sale of this Channel 289B1 for several months. As was the case with Skidelsky's May 1991 petition, Skidelsky has failed to provide a Declaration of Mr. Kayo attesting to the fact that such a telephone conversation did occur, but instead cites to rule Sections 1.351 and 1.3 as support for relaxing the rules of evidence. Skidelsky does provide his own Declaration.

26. Bradmark, of course, opposes Skidelsky's second petition on the grounds that it is unsupported by an affidavit or Declaration of Kayo, "the person whom Skidelsky claims possesses the personal knowledge of facts on which his Petition is predicated," citing to Section 1.229 (d). Bradmark Opposition, *supra* note 11, at 2. Bradmark also opposes the petition on the basis of false allegations, and it attaches the Declarations, under penalty of perjury, of Kayo and Donald Heckman that "neither Bradmark nor anyone acting on its behalf has ever offered to sell the Queensbury B1 to Mr. Kayo and that it has never even been suggested to Mr. Kayo that he might be able to purchase the B1 from Bradmark." *Id.*, at 3. Rather, according to Bradmark, it has had discussions with Kayo concerning the possibility that either he, or a group of investors that he represents, might (a) make a loan to Bradmark to enable it to pay-off its outstanding indebtedness to AT&T; (b) provide Bradmark with a commitment for funding for the B1 which would replace the commitment from AT&T that Bradmark has been relying upon, and (c) purchase *nonvoting* stock in Bradmark. *Id.* Bradmark concludes, "There is nothing improper in Bradmark having had such discussions with Mr. Kayo and the fact that Bradmark has had discussions looking to refinance its existing loan and raise new capital clearly does not cast any doubt on the sincerity of Bradmark's intentions to construct and operate the Queensbury B1 or the sincerity of the Heckmans' commitment to integrate themselves into the operations of that station." *Id.*, at 4.

27. Skidelsky replies that Bradmark's opposition is untimely by two days;[9] that his second petition is supported by his own Declaration and that he has knowledge of the telephone conversation with Kayo; and that "the sole fact alleged in Skidelsky's Petition which is denied by Bradmark's Opposition is that a sale of the B-1 is on the table." Skidelsky Reply, *supra* note 8, at 3. Skidelsky has also filed a Supplement to the second petition, appending a copy of an article from the *Capital District Business Review*, reporting on October 14-20, 1991 that the New York State Insurance Department has revoked the license

of Great Northern Associates Inc., of which William Kayo is President, for breach of fiduciary duty. Skidelsky Supplement, filed November 15, 1991.

28. *Discussion*. Section 1.229 (d) of the rules controls. It states that motions to enlarge issues:

> shall contain specific allegations of fact sufficient to support the action requested . . . [and that] such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof.

47 C.F.R. 1.229 (d). Here, Skidelsky has failed to support either petition with a proper affidavit. The Commission recently admonished the ALJs and the Board to "strictly adhere" to the standards established in Rule 1.229. *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 161 (1990) ("To avoid the need to try unnecessary issues, we expect ALJs and the Review Board to strictly adhere to the standards established in the rule [1.229]."); *Great Lakes Broadcasting, Inc., supra*, 6 FCC Rcd at 4333. ("We believe that the Board and ALJs should strictly enforce the provisions of Section 1.229, including the requirement that petitions to enlarge issues rely on evidence that is new and that could not reasonably have been discovered earlier, in order to expedite the hearing process and the institution of new service.") Further, Skidelsky's argument for relaxation of Rule 1.229, pursuant to Rule 1.351, or waiver, pursuant to Rule 1.3, is unconvincing where the "specific allegations of fact" are contained only in Mr. Skidelsky's own Declarations. As we have stated, "relevant and material hearsay" may be considered but the weight to be accorded hearsay depends on whether "the declarants are disinterested witnesses." *Janice Fay Surber*, 5 FCC Rcd 6155, 6158 (Rev. Bd. 1990). Here, Mr. Skidelsky is clearly not a disinterested witness and, therefore, no weight may be given his statement.

29. An even more critical deficiency in Skidelsky's Petitions to Enlarge is his failure to make the requisite showing for reopenning the record. As stated by the Commission in *Washoe Shoshone Broadcasting*, 5 FCC Rcd 5561 (1990)(citations omitted):

> It is well established that, to justify a reopening of the record, a petitioner must show unusual or compelling circumstances. A petition to reopen must be supported by a showing that the petitioner could not, through the exercise of due diligence, have discovered the facts relied upon at an earlier date, and that the new evidence, if true, would affect the ultimate disposition of the proceeding.

*See Kaye -Smith Enterprises*, 98 FCC 2d 675, 686 (Rev. Bd. 1984) ("the requisite showing for reopening the record [is] the petition must be supported by newly discovered evidence; the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of the hearing; and the new evidence must, if true, affect a basic part of the decision.") (subsequent history omitted); *Kern Radio Dispatch*, 20 RR 967, 969 (1960). The record in this proceeding closed October 19, 1990. *Order*, FCC 90M-3351, released October 24, 1990. Skidelsky has not raised a substantial and material question of fact concerning Bradmark's truthfulness, and he has certainly not presented evidence that would affect the ultimate disposition of the case, if true. Bradmark's explanations for the alleged inconsistencies appear reasonable and, in the absence of a Declaration from Ballman or Kayo corroborating Skidelsky's allegations, we deny the Petitions to Enlarge. *See Henderson Broadcasting Co., Inc.*, 39 RR 2d 257 (Rev. Bd. 1976) (request to reopen record denied where "new evidence" offered was based on newspaper articles reporting plans of applicant's principal to devote time to activities other than proposed broadcast station but principal unequivocally represented that he had abandoned those plans), *cf. Boca Broadcasters, Inc.*, 7 FCC 2d 198 (1967) (request to reopen record granted where "new evidence" consisted of newspaper advertisement for actual sale of CP of proposed station). We likewise deny this second Petition.

## NORMANDY

30. *Transmitter Site*. Normandy originally specified a transmitter site at the intersection of New York Rte. 9 and Northern Pines Road in Wilton, New York.[10] Normandy Application, Section V-B, Question 2a. Its sole voting shareholder, President, Treasurer, and Chairman of the Board Christopher P. Lynch, certified that Normandy had obtained "reasonable assurance" that the site would be available from Frederick Abess, the site owner. *Id.*, Section VII. However, in a Declaration dated June 7, 1990, Abess avowed:

> To the best of my knowledge and recollection, I have never spoken with Christopher P. Lynch, or with anyone who identified himself or herself as acting on behalf of Normandy Broadcasting concerning the utilization of my property for a radio station transmitter site, or about any other matter.

Bradmark Petition, filed June 15, 1990, Exhibit 2. Consequently, the ALJ added an issue "[t]o determine whether Normandy engaged in a misrepresentation, or was lacking in candor, when it certified in its application that it had reasonable assurance that its proposed transmitter site was available." *Order*, FCC 90M-2284, released July 30, 1990.

31. At hearing, the only evidence submitted by Normandy regarding this issue was Lynch's own testimony. In relevant part, Lynch stated:

> 3. One of the telephone numbers I called [regarding sites] was of Bob Howard Realty; I had obtained the number from a "For Sale" sign on property in Wilton. I spoke to a person at Bob Howard Realty, who professed knowledge of the property. The person - identified the land as belonging to Frederick Abess and said that Mr. Abess had listed the property for sale with Bob Howard Realty; - the person gave me a description of the land, including the price and a number of details . . . . -told me that Mr. Abess had complained that Bob Howard Realty had not aggressively marketed the property. I asked the person whether I could negotiate a lower price. The person told me to call Mr. Abess, and provided me with his telephone number.

> 4. I telephoned Mr. Abess from my home. . . . The call lasted about 5-10 minutes. I identified myself and the person at the other end of the line identified himself as Frederick Abess. I explained the purpose of my call which was to find a property I could buy for transmitter-tower site. I also asked whether Mr. Abess' land corresponded to the description that Bob Howard Realty agent had given me. I specifically asked whether the property was available for purchase. Mr. Abess answered that the land was available for sale, and he quoted me a price about $40,000, which I was willing to pay.
>
> 5. The next day, I discussed the site with [Frank E.] Shoupe [Normandy's engineer]. I told him to walk the land.
>
> 6. He thereafter reported that he had walked the land, and he gave specific descriptions of the land. Based on his report, I concluded that the Abess site was suitable and I specified it in the application Normandy filed in August 1987 . . . . I had no further contact with Mr. Abess until June, 1990, when I received a telephone call from a male caller who stated that he was Mr. Abess, and who asked if he had an arrangement about selling his land to me. I thought this was strange and told him that if he were indeed Mr. Abess, he should know whether or not we had an agreement. I asked him why he was asking me and he seemed to get quite agitated. I suggested that if he came down to the radio station the next day, I would be more than happy to discuss the matter with him, but in return for my information, I would definitely want to know why he was pursuing the matter. At that time, he got even more agitated saying something to the effect that "he would just have to do what he had to do." I am reasonably sure the gentleman I spoke to was Mr. Abess because I had to return his call from a message he left on my answering machine; the number was registered to a Mr. Abess. I did not recognize his voice and I declined to answer his question.

Normandy Exh. 7 at 3-4. However, Lynch could not provide the name of anyone he spoke with at the Bob Howard Realty, Tr. 1097; the listing with the realtor had apparently expired, though nobody told Lynch, Tr. 1098-99; and Lynch could find nobody at the realtor who recalled speaking with him. Tr. 1097. The ALJ held that Lynch had failed to support his account of the circumstances surrounding the site certification with "any objective or corroborating evidence," he found Lynch's account otherwise "implausible." *I. D.* at para. 50.

32. But, more importantly, the ALJ concluded that even if Lynch's account were accurate, it "does not support his claim that he had reasonable assurance for the site." *Id.*, at para. 49. The ALJ observed that Lynch "does not explain why he believed he had assurance for the site on the basis of [a five to ten minute] . . . conversation," in which (according to Lynch alone) he and Abess merely discussed the price of the land, and whether Abess would permit Lynch to walk the land to determine if it were suitable for the antenna site. Missing from the "conversation" was any discussion of whether Lynch determined that the land would be available when needed in two to four years, or whether Abess would be willing to sell the land in question on Lynch's terms. *See id.*, para. 51. The ALJ further observed that, even if Abess had forgotten the conversation (as Lynch speculated), Lynch "did not even go to see him or talk with him after Mr. Abess provided his declaration." *Id.* The ALJ concluded:

> On this record, the only conclusion that can be reached is that Normandy designated a site for which it had no assurance and that it knew when it designated the site that it had none . . . .Form 301 has only a few substantive answers which actually provide specific details about an applicant's proposal. The assurance of an antenna site is one of them. If the Commission cannot rely on a truthful answer when so little is asked, it is unlikely that it will be able to do so when the applicant must act as a steward of the public interest over an extended period of time. Normandy has not established that it responded honestly when it told the Commission that it had reasonable assurance for the use of Mr. Abess' land.

*Id.*, at para 52.

33. Normandy excepts to its disqualification based on its site certification, arguing that multiple sites, including the Abess site, were available to the Queensbury applicants in July and August 1987 and, therefore, it had no motivation to lie to the Commission about the Abess land when presumably it could have easily obtained reasonable assurance of any number of sites. *See* Normandy Exceptions at 12.

34. Both Bradmark and Skidelsky have replied. Bradmark argues that the only evidence presented by Normandy was "Lynch's self-serving recollection of his conversations with Abess and a real estate agent whose name Lynch could not recall;" and, as a matter of law, that does not establish that Lynch and Abess reached a "mutual understanding." Bradmark Reply at 4. Bradmark further contends that the "fatal flaw in Normandy's showing . . . is that Lynch clearly failed to discuss with Abess *any* terms for lease or ownership," citing *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1772 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 830 (1990); *Radio Delaware, Inc.*, 4 FCC Rcd 8630, 8631 (Rev. Bd. 1989); *Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5759 (Rev. Bd. 1988)(subsequent history omitted). Bradmark also faults Normandy for failing to present any witnesses to corroborate Lynch's account, citing *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2535 (Rev. Bd. 1989)(settled in part 4 FCC Rcd 6144) (1989), *review granted in part*, 5 FCC Rcd 4562 (1990). Similarly, Skidelsky argues that "at best Lynch expressed a mere general willingness to buy the land" and that is not "a specifically negotiated understanding sufficient to constitute a reasonable assurance of transmitter site availability." Skidelsky Reply at 4-5.

35. *Discussion.* Our review of the record does not persuade us that the ALJ erred in finding that Normandy lacked "reasonable assurance" of a site and disqualifying it accordingly. Though the standard for "reasonable assurance" is a liberal one, there must be "some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for the use of the property as a transmitter site, on terms to be negotiated, and that he would give notice of any change of intention." *Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990); *see also Genesee Communication, Inc.*, 3 FCC

Rcd 3595 (Rev. Bd. 1988) (there must be at least a meeting of the minds resulting in some firm understanding as to a site's availability). Here, we agree with Skidelsky, there was no "clear indication" from Abess, the landowner, that he was "amenable" to allowing Normandy to use his land for an antenna site. *See Adlai E. Stevenson IV, supra*, at 1589. On the contrary, Abess claimed no recollection of being contacted by anyone from Normandy. In this regard, it is worth noting that in appending the site certification to the FCC Form 301, the Commission sought to insure that applicants do, in fact, obtain reasonable assurance from the property owner or its agent that the site will be available thereby deterring "speculative applications." *Order (In the Matter of Amendment of Sections 73. 3572 and 73. 3573 Relating to Processing of FM and TV Broadcast Applications)*, 58 RR 2d 776, 782 (1985). Based on the record here, it can only be concluded that Normandy's application is "speculative," precisely the kind the Commission sought to avoid.[11] We affirm the ALJ. *See REM Malloy Broadcasting*, 6 FCC Rcd 5843, 5845-46 (Rev. Bd. 1991). Because Normandy is disqualified on the basic site issue, we need not go further to determine whether Normandy's conduct amounted to misrepresentation.[12]

## COMPARATIVE CONSIDERATIONS

36. *Diversification*. The ALJ found that neither Bradmark nor Skidelsky suffer a diversification demerit. *I. D.*, para. 72. Skidelsky challenges this conclusion as to Bradmark. Skidelsky Exceptions at 23-26. Although the Heckmans testified that they will divest WSTL(AM) and WENU(FM), and leave their current management positions at those stations (Bradmark Exhibit 1 at 3; Bradmark Exhibit 2 at 5; Bradmark Exhibit 3 at 6) Skidelsky contends that some of their testimony indicates that they believe that they can keep their AM station.[13] Skidelsky further argues that Bradmark's divestiture pledge lacks "a reasonable assurance of effectuation," since it is unclear whether the Heckmans can sell the stations. In response, Bradmark asserts that it and the Heckmans have made "a specific and binding divestiture commitment". They concede that the fact that they will remain in the same broadcast market may affect the price ultimately received for the AM and FM stations, but there is "no record support" for the argument that "it will be impossible for Bradmark to find a buyer." Bradmark Reply at 14-17.

37. We will also credit Bradmark's divestiture pledge. It appears here that Skidelsky is fly-specking the hearing transcript for alleged inconsistencies in the testimony of the Heckmans (*see supra* note 8). The Heckmans have made an unequivocal pledge to the FCC to divest; and have previously retained a media broker to do just that. We have conditioned a grant to Bradmark on its fulfillment of its pledge. Under these circumstances, we find no basis to question the pledge.

38. *Bradmark Integration*. Both Bradmark and Skidelsky, the only qualified applicants, propose 100% integration and were credited with such by the ALJ. *I. D.*, para. 69. Skidelsky and Normandy, however, mutually except to Bradmark's integration credit, and Normandy excepts to Skidelsky's integration credit. Turning first to Bradmark, Donald and Betty Jean Heckman both propose to work full-time as managers, he as general manager and she as business manager. As noted by the ALJ in the *I. D.*, these are positions they currently hold at WENU(FM), Hudson Falls, New York, and WSTL(AM), South Glen Falls, New York. Mrs. Heckman testified as to her specific duties at the proposed station[14] and summed up her role as follows:

> My husband and I have owned and managed Stations WENU and WSTL as a husband and wife "team," and we intend to continue this team management approach in connection with the management of Bradmark's Queensbury FM station. As part of a management team . . . in addition to performing the duties of Business Manager . . . when my husband is absent . . . I will exercise full management authority with respect to all aspects of the station's operations including the programming and sales and routinely participate with my husband in making all major decisions relating to the management and operation of the Queensbury station, and he and I will regularly, and jointly, hold meetings with department heads to discuss and review operating policies and procedures.

Bradmark Exhibit 3, at 2.

39. In part, Skidelsky argues that Betty Jean Heckman is unlikely to exercise management-level responsibilities and that, therefore, Bradmark is entitled to no integration credit or something far less than 100%. Skidelsky specifically argues that Mrs. Heckman: had no role in the preparation of the Queensbury application; was unaware that another Bradmark application was pending at the FCC; was unable to prepare the list of her proposed responsibilities as business manager without her husband's assistance and could not recite them to the ALJ at the hearing without referring to a prepared, written exhibit listing them, even though she currently holds the same position at Stations WENU and WSTL; and that most of her proposed duties are clerical in nature. Skidelsky concludes that,"[c]ontrary to Bradmark's claim of joint team management, the husband (an experienced broadcaster) is clearly the driving force." Skidelsky Exceptions at 28.

40. Bradmark replies that: the portions of the record cited by Skidelsky do not support his argument; in actuality, there is "substantial" record evidence to support the award of integration credit, including Bradmark Exhibit 3; both Heckmans testified as to their management team approach in which they work jointly on matters; and the Heckmans testified as to specific instances involving their existing stations where the managerial role of Mrs. Heckman is evident. Bradmark Reply at 19-20, *citing National Communications Industries*, 6 FCC Rcd 1978, 1982 (Rev. Bd. 1991), in support.

41. We agree with Bradmark that *National Communications Industries* is controlling here. In that case, a similar argument was made that an applicant's integration credit should be diminished because one of its principals (again, the wife in a husband-wife team), who proposed to work full time at the station as the Director of Public Affairs and Public Service, was unlikely to have a managerial role. The argument there was premised on the fact that the principal's current duties at another broadcast station (owned by the same couple) were primarily clerical, and there was testimony that the proposed station would be operated "the same way" as the currently-owned station. We declined there to decrease the integration credit, heeding "the court's admonition in *Office of Communications*

*of United Church of Christ v. FCC*, 425 F.2d 543, 549 (D.C. Cir. 1969), that evidence which is 'not contradicted . . . or on its face incredible . . . [is] entitled to carry the day in terms of establishing the point to which it was directed.'"

42. Skidelsky made essentially the same argument before the ALJ, who rejected it, concluding in relevant part:

> The evidence does not support Skidelsky's claim [that Ms. Heckman's proposal is to work, in effect, as an office manager not a business manager]. Bradmark established that Ms. Heckman will supervise employees and that she will have the authority to hire and fire them. She also, according to Mr. Heckman, is consulted on and helps make policy decisions at the stations they currently operate....Mr. Heckman also provided a very plausible explanation of how they operate as a team and share authority at the stations they now operate; he represents that they will continue to share authority at the proposed Queensbury facility.

*I. D.* at para. 69. As we have said on numerous occasions, "[u]nless clear error is shown, it has been the Board's usual practice to yield to the sapience of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), and to defer on such sensitive factual judgments to 'an impartial, experienced examiner who has observed the witness and lived with the case . . . .' 340 U.S. at 496." *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 688 (Rev. Bd. 1986); *accord, Ft. Collins Telecasters*, 103 FCC 2d 978, 986 (Rev. Bd. 1986) (affirming ALJ's conclusions, in part, based on fact that Board "will generally defer to an ALJ's well-considered conclusions regarding the integration claims of an applicant's principals, particularly where such judgments partake of what we might call a 'credibility' finding'...")(subsequent history omitted). Thus, here too, we will defer to the judgment of the ALJ.

43. Next, Skidelsky and Normandy argue that Bradmark's integration should be reduced by 27% due to the existence of the AT&T warrant. Skidelsky Exception at 30-31; Normandy Exceptions at 18. However, as we indicated *supra*, paragraphs 15-16, warrants are not attributed to applicants in comparative proceedings for purpose of determining integration unless there is a "likelihood" of conversion. *Channel 32 Broadcasting Company, supra*. Here, we find no "likelihood" for the reasons explicated above, and we reject Skidelsky and Normandy's arguments accordingly.

44. Skidelsky further argues that Bradmark should not be credited fully because it lacks a *bona fide* intent to construct as allegedly evidenced by the fact that a prospectus circulated by its broker contained references to a Queensbury "B-1 Upgrade" as being for sale. Skidelsky Exceptions at 32-39. The prospectus, and the alleged sale of a "B-1 Upgrade," were also the subject of a Petition To Enlarge Issues filed by Normandy on November 15, 1990. The ALJ denied the Petition in the *I. D.*, paras. 65-67, finding that the prospectus was a "misunderstanding" by the broker, and that once the mistake was discovered, Donald Heckman "left no doubt that he did not intend to sell the construction permit for the Queensbury facility." *Id.* at para. 67. Significantly, the ALJ found that Heckman had testified to this effect, *id.*, and that Randall E. Jeffrey, a partner in the brokerage firm of Media Venture Partners, had signed a declaration which corroborated Heckman's testimony. Bradmark Opposition To Petition To Enlarge Issues, filed November 28, 1990, Declaration of Randall E. Jeffery at 1.

45. We find that the ALJ did not err in refusing to add the requested issue, since the facts presented were not "newly discovered evidence." These had already been revealed at the hearing, the prospectus marked as Skidelsky Exhibit 3. Further, even if it were "newly discovered evidence," we will not overturn the ALJ's determination that the discussion of the "B-1" in the prospectus was merely a mistake. This conclusion is supported by the fact that when Bradmark was approached about a potential buyer for the AM-FM combination and the B-1 upgrade, according to the broker:

> Mr. Heckman explained that the application that I had assumed involved an "upgrade" of the facilities of Station WENU actually was for an entirely new Class B1 Station, that Bradmark could not sell its interest in this application, and that Bradmark intended to prosecute the B1 application and, ultimately, own and operate the B1 station.

Bradmark Opposition To Petition To Enlarge Issues, *supra*, Declaration of Randall E. Jeffery at 1. Though Skidelsky excepts to this conclusion, he provides no contraverting evidence which would require us to overturn the ALJ's refusal to add the issue or reopen the record.

46. *Skidelsky Integration*. Skidelsky, now a lawyer who proposes to abandon his practice, proposed to work full-time as the station's general manager. Skidelsky Exhibit 1 at 1. Skidelsky testified that, if granted the CP, he would "fully withdraw from all employment, business and any other interests which would interfere with my integration commitment." *Id.* He also testified as to various positions he has held at broadcast stations over a period of fourteen years (from 1969-1973), including but not limited to general manager, sales manager, account executive, program director and air talent.

47. Nonetheless, Normandy contends that Skidelsky should receive no integration credit because "[i]t is settled doctrine that the Commission views with askance a professional's proposal to leave his profession to become a licensee." Normandy Exceptions at 18-19. It is not. For instance, in one recent case where a similar assault was made regarding an attorney's integration pledge, we stated that "we take notice of the fact that any number of attorneys (including communications specialists) have migrated from the field of law to a pursuit in broadcasting." *Renee Marie Kramer*, 5 FCC Rcd 563, 565 (Rev. Bd. 1990), *review denied*, 5 FCC Rcd 5749 (1990), *aff'd by judgment sub nom. Joyner Communications Limited Partnership v. FCC*, No. 90- 1510 (D.C. Cir. September 16, 1991). Normandy has not refuted Skidelsky's sworn pledge to leave the law alone, in a manner of speaking, and repair to Queensbury should he here prevail (which he does not in any event). Based on our review of the record and close reading of Skidelsky's quite numerous pleadings, we do not find unbelievable his stated desire to foresake the law.

48. *Coverage Comparison*. Skidelsky excepts to the ALJ's award of a moderate preference to Bradmark for its proposal to serve more people overall than Skidelsky (Bradmark will serve 261,856; Skidelsky will serve

193,031), and to provide a second nighttime service to 2,834 (Skidelsky will not provide a second service to anyone).[15] *I. D.*, para. 71. Skidelsky first argues that he, alone, is in full compliance with Rule 73.315(a), in that he proposes 100% city grade (3.16 mV/m) coverage but the other applicants do not. The others do propose coverage in excess of 80% of the community. The Mass Media Bureau responded to this argument, pointing out that only "substantial compliance" with Rule 73.315 (a) is required, citing *John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985), and that 80% coverage constitutes such compliance. Mass Media Bureau Reply at 3-4.[16] We must concur with the Mass Media Bureau on this point.

49. Skidelsky also complains that, though he amended his application subsequent to the "B cutoff date" to increase his proposed (3.16 mV/m) coverage in response to a *Memorandum Opinion and Order*, 4 FCC Rcd 5709 (MMB 1989), he is "entitled to restore or maintain the [1mV/m] coverage proposed as of the B cutoff date," rather than the lesser 1mV/m coverage proposed in his amendment. Or, as the Mass Media Bureau pleaded:

> Skidelsky maintains, he should receive credit for the better coverage which he would have provided from a proposal which he has since abandoned. While it may be necessary to employ a fiction to insure that an applicant does not upgrade its comparative coverage as a result of an amendment, it makes no sense to employ one to credit an applicant with coverage that he will not provide.

Bureau Reply at 5. *Women's Broadcasting Coalition Inc.*, 59 RR 2d 730 (1986), cited by Skidelsky as support, runs against him. There an applicant was required to amend to a new transmitter site as a result of the withdrawal of FAA approval. In so doing, the coverage proposed by the applicant was increased from approximately 37,000 to 41,000 people. The Commission there held that the applicant could claim credit for coverage to 37,000 people only, and it held:

> Although [the applicant] cannot effectuate its original proposal, it can provide equivalent coverage from its new site, for which we will give [it] equal credit. Our aim is to accord [the applicant] that degree of credit which would best reflect the actual coverage [it]will provide without unduly prejudicing the other applicant.

59 RR 2d at 733. We find no basis to overturn the ALJ.

50. *Comparative Summation*. Bradmark and Skidelsky have been awarded 100% integration credit, and neither has been accorded diversification demerits. Both propose auxiliary power. However, Bradmark is entitled to a preference for its coverage proposal. Further, Bradmark is qualitatively superior to Skidelsky, as concluded by the ALJ and not excepted to by Skidelsky. We, therefore, affirm the ALJ's award to Bradmark.

51. ACCORDINGLY, IT IS ORDERED, That the Motion To Strike Skidelsky's Exceptions filed July 1, 1991 by Bradmark Broadcasting Company IS DENIED; that the Petition To Enlarge Issues filed May 22, 1991 by Barry Skidelsky IS DENIED; that the Motion To Compel Disclosure filed May 22, 1991 by Barry Skidelsky IS DENIED; that the Petition To Enlarge Issues filed August 15, 1991 by Barry Skidelsky, and the accompanying Motion for Production of Documents, ARE DENIED; and the Motion For Acceptance of Late Filed Opposition filed September 19, 1991 IS DISMISSED AS MOOT.

52. IT IS FURTHER ORDERED, That the application of Bradmark Broadcasting Company (File No. BPH-870819MT) for a Construction Permit for a new FM station at Queensbury, New York, IS GRANTED provided that Bradmark severs all connection with WENU (FM), Hudson Falls, New York, and WSTL (AM), South Glens Falls, New York, before the commencement of program test authority; and, that the applications of Barry Skidelsky (File No. BPH-870819MO) and Normandy Broadcasting Corporation (File No. BPH-870819NK) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

**FOOTNOTES**

[1] Bradmark filed a Motion To Strike Skidelsky's Exceptions on July 1, 1991 and Skidelsky opposed the Motion a week later, on July 8, 1991. We will deny Bradmark's Motion because Skidelsky's Exceptions, while unconvincing, are not "sham and false," such that they should be stricken under Section 1.52 of the Commission's Rules, as requested by Bradmark.

[2] More specifically, that *Order* required that the applicants (*id.*, at n.4):

> submit copies of agreements that may result in changes in ownership, such as unexercised stock option agreements or a loan agreement providing for the conversion of debt to ownership. In addition, any oral agreement which affects control should be described. The description should include the substance of the agreement with an explanation of the circumstances under which it arose. Copies of the statement and any attached documents should be signed by a principal . . . . The parties are reminded that the completeness and accuracy of their statements may be used to form judgments about the applicant's reliability and truthfulness.

Neither the application form in use at that time (FCC Form 301, Oct. 1986), nor the instructions thereto, clearly required the reporting of outstanding convertible interests in the applicant entity. Indeed, both the questions on the form itself and the instructions are linked to the Commission's multiple ownership rules, under which "warrants, debentures and, other convertible interests" are not considered cognizable ownership interests. *Ownership Attribution*, 97 FCC 2d 997, 1021-22 (1984). *But see Doylan Forney, infra* note 5, 5 FCC Rcd at 5427 (convertible interests may yet be considered in comparative hearing process).

[3] We make no judgement here, of course, as to whether AT&T's "understanding" with Bradmark would amount to an improper evasion of state usery laws.

[4] Although the *I. D.*, at para. 5, appears to indicate that this document is contained in "Bradmark Exhibit 4," we found it in "Skidelsky Exhibit 4." Assuming the exhibit to be Skidelsky's,

he was clearly alerted to the warrant agreement. Assuming the exhibit to be Bradmark's, there was disclosure to Skidelsky. The warrant itself was produced by August 22, 1990, and the hearing did not commence until nearly two months later on October 16, 1990. Bradmark Opposition To Consolidated Motion To Enlarge Issues, filed September 17, 1990, at 3.

[5] In fact, recognizing that the Commission's ownership attribution rules categorically exclude convertible rights as a reportable ownership interest when "the contingency upon which the conversion rests is beyond the control of the holder...," *Ownership Attribution, supra* note 2, 97 FCC 2d at 1021-22, (1984), the Board in *Doylan Forney*, 3 FCC Rcd 6330, 6337 (Rev. Bd. 1988), sought to engraft that absolute standard to its own comparative analysis and did not attribute the interests of a warrant holder. However, in its review, 5 FCC Rcd 5423 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. October 7, 1991), the Commission corrected the Board and held that the more flexible *Signal Ministries* standard is the correct one. *See Signal Ministries, Inc.*, 104 FCC 2d 1481 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988). In that regard, a Commission opinion recently noted:

> The Committee correctly observes that in comparative broadcast cases the Commission has adopted a rebuttable presumption that options will be exercised, *see Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1366 (Rev. Bd. 1983)(subsequent history omitted) . . . .

*WWOR-TV, Inc.*, FCC 91-347, released November 13, 1991 at n. 13. We do not believe, however, that this passing footnote language was intended to modify the Commission's prior *Doylan Forney* articulation.)

[6] Skidelsky argues that the "oral understanding" is undermined by the fact that AT&T has allegedly sought to take over stations when the debtor licensees have suffered financial reverses, as evidenced by the filing of applications for assignment of four radio station licenses from Marathon to an AT&T subsidiary, Atmor Properties, Inc. Skidelsky Exceptions at 21-22. However, at oral argument counsel for Bradmark urged that the example cited was a "consensual work out." Tr. 1319. Without more, the Marathon situation does not undermine the "oral understanding" between Bradmark and AT&T. An AT&T Vice President has here sworn on the public record to an "understanding" not to convert. *See generally AT & T v. FCC*, 551 F.2d 1287 (D.C. Cir. 1977) (sworn representations of AT&T official not to be simply disregarded). Should it renege, punitive steps can be taken.

[7] Skidelsky argues that AT&T "is clearly in a position to own or control Bradmark" as evidenced by the fact that "AT&T has directly (by its own check) even paid Bradmark's counsel." Skidelsky Exceptions at 22-23. However, as explained by Bradmark, "on a single occasion, when Bradmark sought to use funds available to it under a line of credit from AT&T's predecessor, Pacificorp, to pay Bradmark's communications counsel, Pacificorp wrote the check directly, and charged the line of credit, rather than writing a check to Bradmark so that Bradmark could then make the payment with its own check" Bradmark Reply at 13. Bradmark rejoins that, in fact, it "maintained full control over the disbursement of funds from the line of credit it had with its lender." *Id.* Under these circumstances, we find the fact that Pacificorp wrote a check for Bradmark to be inconsequential.

[8] Bradmark filed an Opposition To Petition To Enlarge Issues, on May 30, 1991; an Opposition To Motion To Compel Disclosure, on May 30, 1991; an Opposition To Petition To Enlarge Issues, on August 28, 1991; a Motion for Acceptance of Late Filed Opposition, on September 19, 1991. Skidelsky filed a Reply on June 7, 1991; a Motion To Strike and/or Petition For Leave To File Reply on June 7, 1991; a Reply to Bradmark's Opposition on September 9, 1991; an Opposition to Bradmark's Motion For Acceptance of Late Filed Opposition on September 25, 1991; and a Supplement to the August 1991 Petition To Enlarge Issues on November 15, 1991.

Apart from Skidelsky's Petitions To Enlarge and Bradmark's responses, we will dismiss all of the other pleadings as unauthorized. *See* 47 C.F.R. 1.276; 1.277. Nor has Skidelsky made the showing necessary to reopen the record. *See infra* para. 29 and cases cited therein.

[9] Inasmuch as we find that Skidelsky has not adequately supported this petition, Bradmark's lateness is irrelevant.

[10] In October 1987, Normandy amended its application to specify a different site because its original site apparently had "potential FAA problems." Normandy Exhibit 7 at 3.

[11] Normandy contends that the ALJ wrongly placed the burden of proceeding and the burden of proof on it. Specifically, Normandy complains: "As to each issue added against Normandy by the ALJ, he [the ALJ] failed to make any finding that 'the operative facts with respect to the specified issues are *peculiarly* within the knowledge of [Normandy's] . . . principals . . .' . . . and, accordingly, the evidentiary burden of proof should *not* have been put on Normandy." Normandy Exceptions at 6. The ALJ did not err. "The operative facts," here, with respect to the site certification issue were unquestionably "peculiarly within the knowledge of" Mr. Lynch, a principal in Normandy -- he certified on the Form 301 that Normandy had reasonable assurance of a site owned by Mr. Abess and he contacted Abess about the site. Thus, the ALJ's decision on the burdens of proceeding and proof was proper. *See Elyria - Lorain Broadcasting Co.*, 6 RR 2d 191 (1965).

[12] Normandy also excepts to the ALJ's conclusions that its Threshold Showing cannot be relied upon because it contains so many errors and was untruthful in material respects, and that Normandy's failure to report a contingent ownership interest is particularly problematic because its explanation for not doing so was "disingenuous." Normandy Exceptions at 12-18. However, because the Board has already found Normandy to be unqualified for lack of transmitter site, it need not and will not reach these issues.

[13] Skidelsky cites to Tr. 367-368 for testimony of Donald Heckman, and Tr. 100 for testimony of Betty Jean Heckman.

[14] Mrs. Heckman testified that she will: prepare monthly station billings and statements; coordinate final billing figures with the General Manager and Sales Department; generate monthly Profit and Loss Statements; manage and direct the administrative offices, including traffic, receptionist and the sales secretary; hire and fire in the administrative offices; serve as payroll officer; administer state and federal employment regulations; serve as insurance officer; and prepare and file quarterly tax reports for state and federal agencies. Bradmark Exhibit 3 at 1-2.

[15] Skidelsky will provide a third nighttime service to 912 people, but this is decisionally insignificant. *Cf. Woods Communications Group, Inc.*, 6 FCC Rcd 3529 (Rev. Bd. 1991) (applicant's proposal to provide third and fourth TV service not

entitled to preference); *Mark L. Wodlinger*, 101 FCC 2d 762, 773 (Rev. Bd. 1985)(preferences awarded where "*substantial* differences in the provision of third, fourth, and even fifth services.")

[16] Skidelsky is correct when he states that, generally "the applicant who proposes full compliance" with the Commission's Rules is preferred over "those applicants proposing non-compliant sites," Skidelsky Exceptions at 41. However, the competing applicants here are not proposing non-compliant sites, so his general proposition is inapposite. Further, *Millard Orick, Jr.*, 89 FCC2d 571 (Rev. Bd. 1982), relied upon by Skidelsky "predates the processing guideline enunciated in *John R. Hughes*." Bureau Reply at n.1.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-192**

In re Applications of

THOMAS W. LAWHORNE File No. BPH-880505OA

CAM-BROADCASTING, INC. File No. BPH-880505OJ

For Construction Permit for
New FM Station, Channel 271A,
Sylvester, Georgia

*Appearances*

*Bruce A. Eisen* on behalf of Thomas W. Lawhorne; *Robert W. Thompson* on behalf of CAM-Broadcasting, Inc.

**DECISION**

**Adopted: December 18, 1991; Released: January 2, 1992**

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision* (I.D.) of Administrative Law Judge Edward J. Kuhlmann (ALJ), 6 FCC Rcd 4183 (1991), as well as the exceptions of CAM-Broadcasting, Inc. (CAM) and a reply thereto filed by the prevailing applicant, Thomas W. Lawhorne (Lawhorne).

2. The following issues were ultimately specified in this proceeding (I.D., para. 1):

> 1. To determine whether or not CAM-Broadcasting, Inc. has reasonable assurance that its specified antenna site will be available to it.
>
> 2. To determine whether or not CAM-Broadcasting, Inc. has abused the Commission's processes by threatening a competing applicant with use of unknown information to be filed as a motion to enlarge issues unless the applicant acceded to its settlement demands.
>
> 3. To determine whether or not CAM-Broadcasting, Inc. falsely certified and misrepresented facts to the Commission concerning its financial qualifications to build and operate its proposed radio station at Sylvester, Georgia.
>
> 4. To determine, in light of the evidence adduced under the foregoing issues, whether or not CAM-Broadcasting, Inc. is qualified to become a Commission licensee.
>
> 5. To determine which of the proposals would on a comparative basis, best serve the public interest.
>
> 6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applicants should be granted, if any.

**BACKGROUND**

3. Prior to issuance of the I.D., the following events occurred in this proceeding: On June 25, 1990, Lawhorne filed a Motion to Enlarge seeking site availability and abuse of process issues against CAM. As to CAM's transmitter site, Lawhorne alleged that while CAM certified in its application that "Thomas Bozeman" owned the property upon which CAM's transmitter would be located, the coordinates of CAM's proposed transmitter site (as specified in CAM's application) did not, in fact, match the actual land which CAM intended to use.

4. In its Opposition filed July 12, 1990, CAM submitted that, because of an "inadvertent error," the wrong coordinates were listed in its application. However, CAM stated that it "always intended" to use Bozeman's land. In support, CAM submitted the affidavit of Bozeman, President of a real estate firm, stating that he was indeed contacted by a CAM principal in 1988, and that he had agreed in a May 3, 1988 letter to sell five acres of his land to CAM for its use as a transmitter site. Bozeman further stated that, although the coordinates in his letter to CAM were apparently incorrect, the narrative description of the site in CAM's application was correct. CAM then claimed that a "corrective" technical amendment would be filed promptly.

5. At the July 30, 1990 prehearing conference, the ALJ established a procedural schedule, memorialized by *Order*, FCC 90M-2313, released August 1, 1990. Therein, January 8, 1991 was set as the date for the exchange of the applicants' written cases, well in advance of the January 22, 1991 hearing. In a subsequent *Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1990, the ALJ granted Lawhorne's Motion to Enlarge, and added Issues 1 and 4, *supra*, against CAM.

6. On October 25, 1990, more than three months after it promised to file a "corrective" amendment, CAM filed a Petition for Leave to Amend its application. The proffered amendment revised its transmitter site coordinates and increased CAM's effective radiated power from three kilowatts to six kilowatts. Further, in a contemporaneous Declaration, Bozeman stated that CAM's problems were caused when he erroneously "pinpointed the location of my land on the . . . map that was provided by CAM . . . approximately one mile north of where it really is." The ALJ accepted the CAM amendment, noting that it had disclaimed any upgrading of its comparative position in the proceeding. *See Memorandum Opinion and Order*, FCC 90M-3717, released November 26, 1990.

7. On November 28, 1990, CAM filed a Motion for Summary Decision with the ALJ on its site availability issue, urging that its corrective amendment had been previously accepted by the ALJ, and that therefore there remained no further question that Bozeman would make that site available to CAM. On December 12, 1990, Lawhorne opposed CAM's motion, contending that the added issue "relates not merely to the placement of inaccurate coordinates, but to the facts and circumstances surrounding the placement of the coordinates and the availability of the CAM tower site." Lawhorne further

asserted that Bozeman failed to explain in his October 25, 1990 Declaration exactly why he made the mistake of pointing to the wrong spot on the map.

8. However, on December 13, 1990, Lawhorne filed its "Further Comments and Withdrawal of Thomas W. Lawhorne's Opposition to Motion for Summary Decision." Lawhorne now stated that he deposed Bozeman on December 12, 1990, and that: "The deficiencies in his declaration . . . were not all resolved. However, Lawhorne believes that further inquiry into the site availability issue could be fruitless. It does appear that CAM has reasonable availability of the Bozeman site, notwithstanding the fact that the reasons for CAM's original error in specifying the coordinates remain unclear."

9. On January 8, 1991, CAM exchanged its direct case exhibits. There, its Exhibit 4 addressed the outstanding site availability issue in two simple sentences as follows:

> **Site Issue**
>
> The Federal Aviation Administration has notified CAM- Broadcasting, Inc. that our proposed tower site (corrected coordinates) would not be a hazard to air navigation. A copy of the FAA notice is attached hereto as Appendix A.

10. However, by *Order*, FCC 91M-77, released January 9, 1991, the ALJ denied CAM's Motion for Summary Decision "[f]or the reasons given by Lawhorne in its Opposition." On January 14, 1991, Lawhorne requested that CAM produce Bozeman for cross-examination at hearing. Although CAM objected to producing Bozeman, the ALJ expressly ordered CAM to do so. *See Memorandum Opinion and Order*, FCC 91M-229, released January 21, 1991. However, the hearing on January 22, 1991 lasted only a few minutes. After learning that CAM had, in effect, failed to exchange *any* probative written evidence on the designated site availability issue, and upon denying CAM's request to develop any such evidence orally, the ALJ summarily dismissed CAM's application and terminated the proceeding. His rulings were confirmed in an *Order* which concurrently granted Lawhorne's application. *See Memorandum Opinion and Order*, FCC 91M-267, released January 24, 1991. CAM appealed its dismissal to the Board on January 31, 1991.

11. In our *Memorandum Opinion and Order*, 6 FCC Rcd 1864, 1865-66 (Rev. Bd. 1991) (*MO&O*), the Board vacated the "dismissal" of CAM's application, noting (footnotes omitted):

> We have reviewed the facts and circumstances underlying the dismissal of CAM's application. As we see it, the operative dispute between CAM and the ALJ may distill down to form rather than substance. Although it may be that the actions of CAM were not of the egregious and prejudicial character surveyed by the court in *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), CAM's utter failure to present a written case on the outstanding site availability issue would appear to have given the ALJ little legal alternative but to find CAM unqualified on the merits of the designated site issue. We fully recognize that Lawhorne had previously withdrawn its own private opposition to CAM's request for summary decision on that very same issue. But, after considering all of the pleadings, the ALJ himself was not persuaded that no substantial and material questions of fact remained unanswered, and he denied summary decision on the site issue, a matter quite within the ALJ's routine discretion. *See* 47 CFR § 1.251. Similarly within the ALJ's routine discretion was his prehearing order here for the parties to present their substantive evidence in written exhibits, prior *to* the actual hearing. *See Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182, 197-98 (D.C. Cir. 1985) (ALJs have "broad discretion" to regulate hearing). Consequently, when CAM's written exhibit failed altogether to address the outstanding site availability issue, its request to present instead oral evidence at hearing was in rather direct conflict with the ALJ's governing order to the parties to submit their evidence *in advance* and *in writing*.
>
> To expedite its frequently lengthy comparative licensing proceedings, the Commission explicitly authorized its ALJs "to require submission of written evidence . . . [to] avoid unnecessarily prolonging hearings due to taking of oral testimony . . . ." *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 866 (1976); *see also* 47 CFR Section 1.248(d). In failing to present a meaningful direct written case on its site availability issue, CAM -- through neglect, misunderstanding, or otherwise -- now seems unavoidably in default on a very basic qualifying matter. While the ALJ, perhaps, might better have "denied" CAM's application on the merits of the site issue by announcing a total failure of proof, *see, e.g., Victorson Group, Inc.*, FCC 91R-26, adopted March 15, 1991 at paras. 17-21, we find that any error in his "dismissal" was effectively harmless under these facts. On the strict basis of the record before us, CAM seems, *prima facie*, subject to virtually immediate disqualification on the merits. Out of an abundance of caution, however, the Board will, as a procedural matter, vacate the "dismissal" of CAM and remand this matter to the ALJ for disposition in a manner consistent with the Board's foregoing discussion. *See Pan American Broadcasting Co.*, 89 FCC 2d 167 (Rev. Bd. 1982).

**INITIAL DECISION**

12. On July 5, 1991, the ALJ released his I.D., finding CAM disqualified on the tower site issues alone. The ALJ held (6 FCC Rcd at 4183-84):

> On January 8, 1991, CAM did not exchange evidence for its designated antenna site. Because all parties were ordered on August 1, 1990 to submit their evidence in writing on January 8, 1991, CAM failed to meet its burden and it is unqualified. The only other applicant, Lawhorne, is qualified and his application will be granted.
>
> On April 18, 1991, CAM requested leave to supplement its case or for other relief on the antenna site issue. That request will be denied because CAM has not established any equitable or legal justification for now permitting it to file evidence on issue 1. First, CAM argues that it filed site issue evidence on January 8, 1991 in "abbreviated form." That argument is dishonest as Lawhorne points out. CAM

submitted FAA approval of a site on January 8, 1991 but there was no FAA issue and the site issue was whether CAM had reasonable assurance for an antenna site on which it could locate its tower. *See Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1991. The second argument CAM makes is that on the exchange date a motion for summary decision was pending and CAM implies that it believed it need not file its hearing testimony while that request was pending. The second argument is, of course, inconsistent with CAM's first argument that it filed evidence on the issue. Thus, it too is disingenuous under the circumstances. Moreover, CAM did not request an extension of time to file its exhibits. CAM argues that the summary decision should have been granted and in support of that claim it points out that the opposition was withdrawn. Whether to grant requests for summary decision or not is a matter solely within the discretion of the presiding officer. In this case, Lawhorne, in its opposition, argued that CAM had failed to fully explain how the error was made and whether CAM's behavior on the issue exhibited extreme carelessness. The CAM motion was considered on January 7, 1991 and denied for the reasons given by Lawhorne. *Order*, FCC 91M-77, released January 9, 1991. Aside from the issue about reasonable assurance for CAM's site, there were pending issues about CAM's character: whether CAM threatened Lawhorne with a motion to enlarge unless he settled and whether CAM falsely certified and misrepresented facts about its finances. It should be apparent to CAM that any factual questions under these circumstances would best be resolved after the credibility and demeanor of CAM's principal could be fully tested. In any event, the order denying the motion for summary decision was issued on January 7 and released on January 9, 1991. CAM made no effort to file its testimony during the thirteen days before the hearing that followed denial of its request for summary decision.

> CAM's request is in most respects dishonest and argues with the presiding officer's judgment. It fails to establish any equitable reason for allowing CAM to file at this late date . . . .

13. On October 9, 1991, CAM filed a Petition for Leave to Amend with the Board, claiming that the alleged Bozeman site "would no longer be available" to it (Bozeman advised CAM by letter that the site had been sold, and observed that "I presume that the FM radio station is a dead issue . . . ."), and proposing a new transmitter site. Both Lawhorne and the Commission's Mass Media Bureau oppose CAM's attempt to amend because, *inter alia*, CAM never possessed "reasonable assurance" of its initial site.

## DISCUSSION: CAM TOWER SITE

14. We hold that the ALJ reasonably acted within the broad discretion vested in him in the conduct of hearing proceedings and properly denied CAM's application for its failure to meet its burdens under the tower site issues. *See* 47 CFR § 1.243; *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). As the Board previously observed in its *MO & O*, 6 FCC Rcd at 1865: "CAM's utter failure to present a written case on the outstanding site availability issue would appear to have given the ALJ little legal alternative but to find CAM unqualfied . . . ." Further, although specifically ordered by the ALJ to submit a direct written case, "CAM's written exhibit failed altogether . . . ." *Id.*[1] The Board must determine only whether the ALJ committed substantive or procedural error in conducting the case and applying the law. Here, CAM's utter and undeniable failure to adequately meet the serious basic qualifications issue as to its tower site with a preponderance of its own evidence results in an absolute failure of proof at hearing by CAM. Such a delict must be deemed legally fatal to its application. *Victorson Group, Inc.*, 6 FCC Rcd 1697, 1701 (Rev. Bd. 1991).

15. As to CAM's October 9, 1991 Petition for Leave to Amend to specify a new tower site (because of loss of the Bozeman site), we will deny the Petition. Because CAM has been disqualified under its previously-designated tower site issue, it has not demonstrated that it had "reasonable assurance" of its original site and it cannot now amend to a different site. *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n. 12 (Rev. Bd. 1984); *Classic Vision, Inc.*, 104 FCC 2d 1271, 1273 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 2376 (1987); *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2535 (Rev. Bd. 1989) (subsequent history omitted); *REM Malloy Broadcasting*, 6 FCC Rcd 5843, 5846 (Rev. Bd. 1991).

## CAM's MOTION TO REOPEN AND ENLARGE ISSUES

16. On September 4, 1991, CAM filed a Motion to Reopen the Record and to Enlarge the Issues, claiming that (1) Lawhorne, the Mayor of Sylvester, Georgia, had arrest warrants issued against him in July 1991 for having city employees (or inmates sentenced to community service work) perform services for his private benefit; (2) each charge was a felony; (3) Lawhorne did not disclose this information to the Commission; and (4) this failure must result in the reopening of the record here and the addition of "a reporting issue," pursuant to 47 CFR § 1.65. CAM Motion at para. 10.

17. In opposition, Lawhorne claims that (1) he was not intentionally withholding any relevant information from the Commission; (2) applicants are required to provide information only on pending adjudications of relevant misconduct; (3) the Commission will not take cognizance of non-FCC misconduct involving alleged criminal activity unless it is adjudicated, or if a failure to disclose concerns a conviction, an indictment, or a pending case involving relevant misconduct that is before a court or administrative body; (4) here there has been no adjudication of any of the charges to which CAM refers; there has been no indictment, only an arrest. "Thus, at this early date, Lawhorne did not have to amend his application to report the charges because there has been no adjudication and no matter pending before any court such as an indictment;" (5) in the modification of its *Policy Regarding Character Qualifications*, 5 FCC Rcd 3252 (1990), the Commission has clarified its earlier position that it will only consider adjudications involving fraudulent representations to government bodies, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations, to an approach that now considers any conviction for misconduct constituting a felony; (6) while Lawhorne acknowledges that an arrest is a serious matter, nothing that CAM has alleged has

ripened to such a point that a Section 1.65 amendment was required, and CAM has not made a *prima facie* showing of a pattern of repeated reporting violations, nor for significant carelessness, inattention, or deliberate concealment of present decisional significance; (7) FCC Form 301 does not require an applicant to report an arrest, and in the absence of an indictment for the kind of violations set forth in FCC Form 301, Section II, Question 12(a), there is no matter "pending in any court or administrative body" (involving the matters referred to in question 12(a)); (8) since no indictment (felony) has been returned and no accusation (misdemeanor) has been filed, it cannot be maintained that there is a criminal case pending before any court, the substance of which should have been reported pursuant to Section 1.65 of the Rules and Questions 12(a) and 12(b) of FCC Form 301; and (9) CAM has made no showing that Lawhorne is guilty of an intent to conceal.

**DISCUSSION**

18. The Board finds that CAM has failed to make the requisite showing necessary to reopen the record here to add a "reporting issue." As the Commission noted in *Washoe Shoshone Broadcasting*, 5 FCC Rcd 5561 (1990):

> It is well established that, to justify a reopening of the record, a petitioner must show unusual or compelling circumstances. *WEBR, Inc. v. FCC*, 420 F.2d 158 (D.C. Cir. 1969); *Kidd v. FCC*, 302 F.2d 873 (D.C. Cir. 1962); *Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72, 74 (1976). A petition to reopen must be supported by a showing that the . . . new evidence, if true, would affect the ultimate disposition of the proceeding. *Southeast Arkansas Radio, Inc., supra.*

*See Kaye-Smith Enterprises*, 98 FCC 2d 675, 686 (Rev. Bd. 1984) ("the requisite showing for reopening the record [is that] the petition must be supported by newly discovered evidence; . . . and the new evidence must, if true, affect a basic part of the decision"). In a substantially similar situation, the Board recently declined to add a 47 CFR § 1.65 "reporting issue" where an applicant principal had failed to disclose that a felony complaint charge (solicitation of perjury) had been lodged against him. *Coast TV*, 5 FCC Rcd 6720 (Rev. Bd. 1990). We there held (*id.*, at 6722-6723):

> We will not add the requested issues. In its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) . . . the Commission stated its concern with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." 102 FCC 2d at 1190-91. The Commission there held that it would consider only adjudications involving fraudulent representations to government bodies, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations. *Id.*, at 1195-97, 1200-1203. In a modification of its policies, *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), the Commission broadened its approach to consider any conviction for misconduct constituting a felony, and further noted that it "retain[ed] the discretion to consider serious misdemeanor convictions in appropriate or compelling cases, particularly where there is a pattern of such convictions." *Id.*, at 3252, 3254, n. 3. While the original felony charge of solicitation of perjury would appear to satisfy the Commission's test of criminal misconduct involving false statements or dishonesty, that count has now been dismissed (apparently in exchange for a no contest plea on a misdemeanor charge). With regard to the latter charge, there is no evidence before us that this incident was part of a pattern of criminal behavior. Moreover, there is no Commission precedent yet on what constitutes "appropriate or compelling" circumstances requiring further examination. Though Green has pleaded no contest to a serious misdemeanor, we will refrain from further action in this case of first impression, pending future Commission guidance. As to Mission's initial failure to timely report the filing of criminal charges against Green, Coast has not made a *prima facie* showing of a pattern of repeated violations or other significant carelessness or inattention, deliberate concealment, or present decisional significance. *See Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n. 9 (1984).

19. The Board finds that Lawhorne was not required to report the arrest under *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) ("*1986 Character Policy Statement*"), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3253 (1990) ("*1990 Character Policy Statement*"); *recon. granted in part*, 6 FCC Rcd 3448, 3449 (1991) ("*1991 Character Reconsideration Order*"); *partial stay granted*, 6 FCC Rcd 4787 (1991). Thus, CAM has failed to make their *prima facie* showing that would warrant further consideration here. *See Citizens for Jazz on WRVR v.FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988); *see also Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1990) (no issue added where movant failed to make *"prima facie* case"). Additionally, it is undisputed that on November 13, 1991, the District Attorney for the Tifton Judicial District (Georgia) informed Lawhorne that all the warrants have been dismissed (without prejudice, and subject to the taking of the warrants by a grand jury, pending further review). *See* Lawhorne Statement of Clarification filed November 25, 1991. Thus, the record in this proceeding will not be reopened and the issues will not be enlarged. Nevertheless, we note that should this matter be ultimately resolved adversely with respect to Lawhorne, appropriate subsequent steps may be taken at that time. *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861, 863 (Rev. Bd. 1990) (subsequent history omitted).

## CONCLUSIONS

20. CAM has filed no other exceptions to Lawhorne's application. The ALJ determined that CAM is unqualified and that Lawhorne, as the only remaining qualified applicant, would receive the construction permit at contest. We have affirmed the ALJ in all material respects; thus, Lawhorne's application will be granted.

21. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed by CAM-Broadcasting, Inc., on February 21, 1991, IS GRANTED, and the attached amendment IS ACCEPTED; and,

22. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and to Enlarge the Issues filed by CAM-Broadcasting, Inc. on September 4, 1991, IS DENIED; and,

23. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by CAM-Broadcasting, Inc. on September 11, 1991, to the extent that it reports loss of its original transmitter site, IS GRANTED, and the attached amendment, as limited above, IS ACCEPTED; and,

24. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by CAM-Broadcasting, Inc, on October 9, 1991, IS DENIED; and,

25. IT IS FURTHER ORDERED, That the Request for Leave to File Pleading (a "Statement of Clarification") filed by Thomas W. Lawhorne on November 5, 1991, IS GRANTED, and the Statement of Clarification of the same date IS ACCEPTED; and,

26. IT IS FURTHER ORDERED, That the application of CAM-Broadcasting, Inc. (File No. BPH-880505OJ) IS DENIED, and the application of Thomas W. Lawhorne, for a new Class A FM facility at Sylvester, Georgia (File No. BPH-880505OA) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

## FOOTNOTE

[1] As explicated, CAM attempted only to present "oral" testimony. We note that in its recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 162 (1990) (footnote omitted), the Commission has now declared that:

> We will make it clear that ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings. Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-142**

In re Applications of

ALGREG CELLULAR ENGINEERING *et al.* File No. 10607-CL-P-307-A-89 *et al.*

For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 18, 1991; Released: January 2, 1992**

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL concurring in result.

1. On October 11, 1991, ZDT Partnership (ZDT) filed a petition, pursuant to 47 CFR § 1.106, seeking reconsideration of our *Memorandum Opinion and Order*, 6 FCC Rcd 5299 (Rev. Bd. 1991), which denied ZDT's appeal based on its claim of an absolute right to intervene in the revocation portion of this proceeding. Opposing and commenting pleadings were filed by the other parties to the case on October 22, and November 1, 1991. We hereby deny ZDT's petition which is "procedurally deficient." *Cf. Ronald Sorenson*, FCC 91-371, released November 21, 1991.

2. 47 CFR § 1.106, and other Commission precedent, require that a person seeking rehearing based upon new factual or legal matters must show that the new information could not have been earlier discovered through the exercise of ordinary diligence. The Court has specifically upheld this Commission requirement because "[o]rderliness, expedition and finality in the adjudicatory process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own." *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1965). Similar considerations have been enforced against belated petitions to intervene. *See Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967).

3. At earlier stages of this proceeding, ZDT (a) in its petition to intervene before the presiding Administrative Law Judge, and (b) on appeal to the Board, argued that it had an absolute right to intervene in the revocation portion of the case. The Board held that the statute and relevant rules "do not provide for intervention as a matter of right," 6 FCC Rcd at 5300, para. 9, and that ZDT could not be allowed to intervene as a matter of discretion without the special showing required by controlling Commission precedent, citing *Victor Muscat, et al*, 31 FCC 2d 620, 621 (1971). *Id.*

4. On reconsideration, ZDT now argues that it should have been allowed to intervene as a matter of discretion, without the required special showing, because other parties have been allowed to intervene in the proceeding and none have "made any 'special showing' which ZDT is being required to make to justify its intervention in the revocation proceedings." Petition, p. 2. ZDT further argues that: "It is black letter law that similarly situated parties must be treated in a similar manner and that in requiring ZDT to make such a showing is treating ZDT unfairly in violation of well established principle of administrative law." Petition, p. 3.

5. Despite the Commission two-decade-old requirement of a special showing to intervene in a revocation proceeding, ZDT has not attempted to explain why its present arguments were not advanced before the ALJ or an appeal to the Board. On the contrary, its earlier pleadings relied on the claim of an absolute right to intervene. Nor has ZDT made a persuasive showing to support its new claim that it is similarly situated to other parties who have been allowed to intervene (*e.g.*, although this point has not been fully briefed, it appears that the other parties may have participated in a lengthy Commission investigation prior to designation for hearing. ZDT did not.) These patent procedural deficiencies in ZDT's petition make it unnecessary to reach the more difficult question of whether the Board is authorized to ignore a specific Commission requirement because other members of the Commission staff may have overlooked the requirement in allegedly comparable cases. *But see Horne Industries, Inc.*, 91 FCC 2d 1193, 1194 (Rev. Bd. 1982) (Board may not change "old [Commission] policy").

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed October 11, 1991 by ZDT Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-203**

In re Applications of

| | |
|---|---|
| KENNEDY BROADCASTING, INC. | File No. BPH-900125MQ |
| HBA BROADCASTING, INC. | File No. BPH-900125MT |
| MJR BROADCASTING LTD PARTNERSHIP | File No. BPH-900125MV |
| P.V.R. COMMUNICATIONS, L.P. | File No. BPH-900125MX |
| LITTLE RIVER COMMUNICATIONS GROUP, INC. | File No. BPH-900125MY |

For Construction Permit for
New FM Station, Channel 299C2,
Martinez, Georgia

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 18, 1991; Released: January 2, 1992**

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

1. Before the Review Board is a Petition for Reconsideration and Request for Certification to the Commission of our *Memorandum Opinion and Order*, 6 FCC Rcd 6489 (Rev. Bd. 1991), filed by Kennedy Broadcasting, Inc. (Kennedy), on December 6, 1991. In that *Order*, the Board acted on an "appeal" filed by HBA Broadcasting, Inc. (HBA) which sought reinstatement of its application in this proceeding. HBA, it will be recalled, was dismissed by the Presiding Officer for failure to timely tender its required hearing fee.

2. In our *Order*, we held (*id.*, at para. 2):

> HBA is before the wrong forum. In the Commission's *Proposals to Reform the. .. Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 3403, 3409 (1991), applicants were directed to file "[a]ny requests for reconsideration of the dismissal of applications for fee defects . . . [with] the Commission's Managing Director." *Id.*, at Appendix A. In light of the foregoing, HBA's Appeal will be referred to the Commission's Managing Director. *See also CSJ Investments, Inc.*, 5 FCC Rcd 7653 (1990).

3. It is not HBA that seeks reconsideration before the Board; rather, a competing applicant; Kennedy, claims that the Managing Director has yet to act and urges that the Board promptly resolve the matter or certify the proceeding to the Commission.

4. Kennedy's Petition will not be entertained and will be dismissed. *See* 47 CFR § 1.102(b)(2) ("Petitions for reconsideration of interlocutory actions will not be entertained"); 47 CFR § 1.106(a)(1) ("Petitions for Reconsideration of [non-final] interlocutory actions will not be entertained"); and, 47 CFR § 1.291(c)(3) ("Petitions requesting reconsideration of an interlocutory ruling made by . . . the Review Board . . . will not be entertained"); *Roxanne Givens*, 5 FCC Rcd 7010 (Rev. Bd. 1990); *REM Malloy Broadcasting*, 6 FCC Rcd 6497 (Rev. Bd. 1991).

5. ACCORDINGLY, IT IS ORDERED, That the Request for Extension of Time filed by HBA Broadcasting, Inc., on December 16, 1991, IS DISMISSED as moot; and,

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration and Request for Certification to the Commission, filed December 6, 1991, by Kennedy Broadcasting, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-190**

In re Application of

JUDITH O. and LARRY R. ORKUS — File No. BPH-900510MF

For Construction Permit for
New FM Station, Channel 300A,
Port Matilda, Pennsylvania

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 19, 1991; Released: January 2, 1992**

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

1. Before the Review Board are: a Joint Request For Approval of Settlement Agreements, filed October 18, 1991 (and Supplemented October 28 and November 22, 1991), by Phyllis J. Thaler (Thaler), Port Matilda FM Limited Partnership (PMFMLP), and Judith O. and Larry R. Orkus (Orkus); and a Contingent Petition For Leave To Amend, filed October 18, 1991, by Orkus and STS Broadcasting Limited Partnership (STS). The agreement and amendment contemplate: (1) a merger of Thaler and PMFMLP into a new entity, STS; (2) the substitution of STS for Orkus, in the Orkus application; (3) the withdrawal of principals, Judith and Larry Orkus, from their application in return for partial reimbursement of expenses incurred in prosecuting the application; and (4) amendment of the Orkus application to substitute a new engineering proposal. Comments in support were filed by the Mass Media Bureau on October 31, 1991. For the reasons set forth, *infra*, we will approve the settlement agreements and accept the amendment.

**BACKGROUND**

2. Thaler, PMFMLP, and Orkus are three of the seven applicants that originally applied for the instant facility. Joint Request at 2. Prior to the designation of the applications for hearing, Thaler, a sole proprietor, and PMFMLP, a limited partnership, agreed to merge and form a joint applicant, STS, which would be substituted as the applicant under the Thaler application. *Id.* STS then reached an agreement with Orkus, whereby Orkus would dismiss its application in return for monetary consideration. *Id.* Those requests for approval were filed on July 9, and July 31, 1991, respectively, but the Commission took no action because the latter agreement had been filed between the adoption and the release dates of the *Hearing Designation Order*, 6 FCC Rcd 4676 (1991) (*HDO*). Joint Request at 3. The *HDO* designated the applications of PMFMLP and Orkus (and three others) for hearing, but dismissed Thaler's application under the Commission's "hard look" processing procedures for FM applications[1] because it violated an agreement between the United States and Canada (U.S. Canadian Agreement) prescribing power limitations for domestic stations located within 320 kilometers of the Canadian border. *Id.* at 4676. Thaler timely filed a petition for reconsideration of her dismissal. Joint Request at 3. Thereafter, the requests were referred to presiding Administrative Law Judge Walter C. Miller (ALJ); but because the Thaler application was not before him, he was unable to grant the settlement as originally proposed. By *Memorandum Opinion and Order*, FCC 91M-2801, released September 12, 1991, he dismissed all of the designated applications, save that of Orkus whose application he granted, and terminated the proceeding. He reported that only Orkus had paid its hearing fee, filed its Notice of Appearance, and proffered its Integration and Diversification Statement on the due date. *Id.*

**REVISED AGREEMENT**

3. Following the ALJ's actions, the parties revised the agreements and prepared an amendment to accommodate the new circumstances in the wake of the *HDO*. Thus, under the amendment, STS will now be substituted for Orkus under the Orkus application, and will utilize Thaler's engineering proposal. Judith and Larry Orkus propose to withdraw from the application for a cash payment of no more than $20,880, a sum Orkus represents is less than its legitimate and prudent expenses incurred in this proceeding. Joint Request at n.2. Orkus' accompanying documentation establishes total expenses of $25,986.74. Supplement, filed November 22, 1991, at 2. STS will consist of Ms. Thaler, holding a 50% voting and equity interest as one of its general partners; Jeane V. Singer, now general partner of PMFMLP, holding the remaining 50% voting interest as the other general partner, and a 26% equity interest overall; and Steven S. Seltzer, currently the limited partner of PMFMLP, holding the final 24% equity in STS as a limited partner. In regard to the new (Thaler's) engineering proposal, the parties assert that Thaler's application was dismissed because its proposed Effective Radiated Power (ERP) of 5.8 kW had not been cleared by Canada when filed, but the instant FM channel has now been cleared for up to 25 kW ERP.

4. In supporting the amendment, the Bureau contends there is no bar to a grant to STS. Thaler's character is not implicated since her application was dismissed for technical noncompliance with the U.S.-Canadian Agreement; PMFMLP's dismissal occurred only because it did not pay its hearing fee after its merger with Thaler (which did pay its hearing fee); and there is no violation of the Commission's policy against third-party buy-outs established by *Rebecca Radio of Marco*, 5 FCC Rcd 937 (1990), *recon. denied*, 5 FCC Rcd 2913, since STS is composed of two applicants that have sought the instant facility from its inception. As for the engineering revision, the Bureau reports that the Canadian government has concurred with the use of a higher power by the station on the instant frequency and that the Thaler technical proposal no longer violates the U.S.-Canadian Agreement. The Bureau further represents that its engineering staff has reviewed the engineering amendment and determined that the amendment complies with all of the Commission's technical requirements. Finally, the Bureau agrees with the

settling applicants that grant of the joint petition and approval of the settlement agreements, as modified, would serve the public interest.

5. *Discussion.* Agreements for removing application conflicts are governed by Section 73.3525 of the Commission's Rules, 47 CFR § 73.3525. In compliance with that rule, the parties have submitted copies of their settlement agreements, as well as the appropriate declarations under penalty of perjury that their applications were not filed for purposes of reaching the settlement and that the agreements are in the public interest because they will hasten a new FM service to Port Matilda. In addition, Orkus has set forth an itemized accounting of the expenses for which it seeks reimbursement, such accounting reflecting that the expenses are more than the amount Orkus will be recovering.[2]

6. As for the amendment facilitating the settlement, Section 73.3522(b) of the Rules, 47 CFR § 73.3522(b), requires that postdesignation amendments be supported by a showing of good cause (*i.e.*, due diligence; involuntariness; no addition of parties or enlargement of issues; no disruption; no prejudice to other parties; and no comparative advantage). *See generally Erwin O. Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). The parties here have acted with diligence. They filed their amendment promptly following the execution of revised settlement agreements necessitated by the *HDO*. Insofar as the amendment was dictated by the *HDO*, the amendment cannot be deemed voluntary. Additionally, the amendment would not require the addition of parties or the enlargement of issues since the STS principals consist only of principals of the two merging applicants, Thaler and PMFMLP. Nor would the amendment be disruptive, unfairly prejudicial to other parties, or confer any comparative advantage since it would facilitate an immediate termination to the proceeding. In light of the foregoing, we find no impediment to the amicable settlement of this proceeding. *See Lamar Communications, Inc.*, FCC 91I-075, released November 18, 1991 (approval of settlement agreement and acceptance of amendment permitting substitution of new corporation as applicant and proposed permittee, and allowing change of transmitter site to a tower previously proposed by one of the dismissing applicants); *see also Marlin Broadcasting of Central Florida, Inc.*, 3 FCC Rcd 6965 (Rev. Bd. 1988) (accepting amendment reflecting merger agreement and substitution of dismissing applicant's engineering proposal).

7. ACCORDINGLY, IT IS ORDERED THAT, The Contingent Petition For Leave To Amend, filed October 18, 1991 by Judith O. and Larry R. Orkus and STS Broadcasting Limited Partnership IS GRANTED, and the amendment substituting STS Broadcasting Limited Partnership as the applicant in the Orkus application and the new engineering proposal IS ACCEPTED; and

8. IT IS FURTHER ORDERED, That The Joint Request For Approval of Settlement Agreements, filed October 18, 1991, as supplemented on October 28, and November, 22 1991, by Phyllis J. Thaler, Port Matilda FM Limited Partnership, and Judith O. and Larry R. Orkus IS GRANTED, the attached Agreements ARE APPROVED; and the application of STS Broadcasting Limited Partnership (formerly Judith O. and Larry R. Orkus) (File No. BPH-900510MF) IS GRANTED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

**FOOTNOTES**

[1] *Report and Order* (Dkt. No. 84-750), 50 Fed. Reg. 19945 (1985), *recon. denied*, 50 Fed. Reg. 43157 (1985). (This *Hard Look Order* is reprinted in 58 RR 2d 776 (1985)).

[2] Our disposition should not be construed as determining whether settlement agreements resubmitted after July 31, 1991, in direct consequence to the Commission's failure to entertain them earlier, are subject to the rule changes, effective August 1, 1991, limiting payments to legitimate and prudent out-of-pocket expenses. *Settlement Agreements Among Applicants For Construction Permits*, 6 FCC Rcd 85 (1990), *modified*, 6 FCC Rcd 2901 (1991).

[3] In light of our disposition, Thaler's pending petition for reconsideration is subject to dismissal.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3383

Revisions to Tariff F.C.C. No. 12

**ERRATUM**

**Released: January 2, 1992**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On December 19, 1991 the Common Carrier Bureau adopted and released an Order in the above-referenced proceeding (DA 91-1476). This Order corrects paragraph 1 of the December 19 Order as follows:

> American Telephone and Telegraph Company (AT&T) has filed Transmittal 3383 to introduce revisions to Virtual Telecommunications Network Service (VTNS) Option 86 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions would correct an inadvertent omission in the tariff. This transmittal is scheduled to take effect December 20, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-411**

Amendment of Sections of Part 22
of the Commission's Rules in the
Matter of Airborne use of
Cellular Telephones and the Use of
Cell Enhancers in the Domestic
Public Cellular Radio Service.

**REPORT AND ORDER**

**Adopted: December 12, 1991; Released: December 30, 1991**

By the Commission:

## I. INTRODUCTION

1. On September 2, 1988, we released a Notice of Proposed Rule Making (Notice)[1] seeking comments on proposed rules to prohibit the airborne use of cellular telephones and to allow the use of cellular "enhancers." We received 19 comments and six reply comments filed by engineering consultants, product manufacturers, telecommunication corporations, and trade associations.[2] In addition, the Commission recently received correspondence from the Federal Aviation Administration (FAA) concerning the use of cellular telephones in aircraft.[3] After carefully considering the FAA's position and the comments[4] submitted in this proceeding, we are adopting rules to prohibit the use of cellular telephones in airborne aircraft. We will, however, permit the on-ground use of cellular telephones, subject to airline or FAA policies or regulations, and the installation of cellular telephones in aircraft. Furthermore, we will allow for the authorization of cell enhancers or repeaters on a regular non-developmental basis.

## II. CELLULAR TELEPHONES IN AIRCRAFT

### A. Background

2. To satisfy the public radio-telephone needs in the 1970's, the Commission allocated spectrum for air-ground service.[5] Subsequently, the Commission allocated spectrum for the cellular radio service. *See, e.g., Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982) (Reconsideration Order), *further modified*, 90 FCC 2d 571 (1982) (Further Reconsideration Order), *appeal dismissed sub nom. U.S. v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983). As consumer demand for cellular service grew, demand for variants of mobile service developed, *e.g.*, authority to use cellular telephones in airplanes, helicopters, balloons and other airborne vehicles.[6] In addition, the FAA contacted the Commission on several occasions requesting an interpretation of the Commission's rules concerning the use of cellular telephones in aircraft. In an effort to provide guidance concerning airborne use of cellular telephones under our rules, the staff issued a Public Notice (Mimeo No. 0200) on October 11, 1984, stating that "[t]here are no cellular frequencies available for air-ground service, and persons owning, installing, or operating airborne cellular units will be subject to enforcement action." This Rule Making was initiated to codify this policy and to clarify rules concerning the use of cellular telephones in aircraft.[7]

3. Specifically, the Notice proposed amending Section 22.911 of the rules, "Permissible communications," to state that cellular mobile stations or portable units may not be installed or operated in aircraft, balloons or any other vehicle capable of airborne operation. The prohibition against the use of cellular telephones in aircraft, the Notice explained, was based on the Commission's concern that such use could cause serious interference to transmissions at other cell locations within the system and to cellular systems in adjacent markets.

### B. Discussion

4. The commenting parties distinguish between use of cellular telephones in aircraft on the ground and use of such telephones in airborne aircraft. They overwhelmingly agree that the use of cellular telephones in airborne aircraft could cause interference to cellular operations in one or more systems due to the greatly increased transmitting range of such cellular units. However, most parties support the use of cellular telephones while the aircraft is on the ground. They point out that cellular telephones used in aircraft on the ground have the same transmitting range as other ground-based cellular telephones and therefore do not create a long range interference risk. They argue that commercial airline passengers who are faced with substantial ground delays after boarding their flights should be permitted to use their portable cellular telephones for business and personal purposes as long as the aircraft remains on the ground.

5. The key technical feature of the cellular radio service is frequency reuse, *i.e.*, using the same frequency several times among different cells within a market. If a cellular telephone is used in an airborne aircraft, it will have a much greater transmitting range than a land-based cellular telephone and its signal will be received at a multiplicity of cell locations within the market, causing harmful operational interference. Furthermore, because a cellular telephone is capable of operating on all of the assigned cellular frequencies, serious interference could occur to cellular systems in other markets as well. We agree that the need for noninterference in all cellular transmissions outweighs the benefits that would be realized by allowing the public to use cellular service in airborne aircraft.[8] Therefore, as proposed in the Notice, we will codify our present policy and amend Section 22.911 to prohibit the use of cellular telephones in airborne aircraft. *See* Appendix B.

6. On November 27, 1989, the Associate Administrator for Airways Facilities at the FAA sent a letter to the FCC, stating that the FAA objected to the use of cellular telephones in aircraft whether the aircraft is on the ground or in the air.[9] He stated that cellular phones may interfere with aircraft systems.[10]

7. On September 19, 1991, the Associate Administrator filed a second letter stating that the FAA had reassessed its position and no longer supports a total ban on the use of cellular phones aboard aircraft that are on the ground.

Instead, the FAA is developing operational guidelines "to restrict cellular telephones to use at the gate and during an extended wait on the ground if authorized by the captain."

8. The record generally supports a finding that there are public interest benefits to allowing the use of cellular telephones in aircraft while on the ground. However, the FAA has joint jurisdiction with the FCC regarding the use of telecommunications devices on airplanes. Because the FAA has raised concerns that cellular telephones may, under certain circumstances, cause interference with aircraft systems and there is a need for further testing in this area to assess this potential risk, we will defer to the FAA on aircraft operations to establish regulations for use of cellular telephones on aircraft on the ground.[11] The FAA is addressing this issue by developing operational guidelines to restrict cellular telephones to use at the gate and during extended waits on the ground when authorized by the captain. We applaud these efforts to establish reasonable guidelines to protect airline safety while permitting some uses of cellular telephones on aircraft while on the ground.

9. In addition, the majority of the commenters state that we should permit telephones to be installed on aircraft provided that these telephones are used only when the aircraft is on the ground. These parties indicate that there are a number of legitimate reasons why a cellular telephone may be installed in a private aircraft. For example, CTIA indicates that cellular telephones installed in helicopters and other aircraft which land in areas where public telephone facilities are not available could be used for ground-based communications by rescue services, news teams, businesses and others.

10. COM/NAV and the National Telephone Cooperative Association support the Commission's proposal to prohibit the installation of cellular units on aircraft because an overall ban is the only way to ensure that cellular telephones are not used in the air. Furthermore, COM/NAV believes that a ban is not burdensome because alternative means of communication are available, both in aircraft and in airport facilities.

11. The Notice proposed to prohibit the installation of mobile stations or portable units in aircraft. However, no information or evidence has been presented showing that the installation of cellular telephones in aircraft would cause interference to cellular transmissions.[12] Moreover, the record indicates that cellular telephones may be particularly useful in private aircraft and that there is a legitimate need to have cellular telephones installed in such aircraft. While we share COMNAV's concern that cellular telephones should not be used in an aircraft that is airborne, we have concluded, as discussed above, that cellular telephones may be used on the ground subject to FAA regulations. Thus, a general prohibition on the installation of cellular telephones in aircraft is overreaching. Cellular telephone users who willfully or repeatedly violate our rules prohibiting the airborne use of cellular telephones are subject to strict remedial action which includes monetary forfeitures (*see* Section 503 of the Act, 47 U.S.C. Section 503) in addition to action by the FAA.[13] We find this an adequate means to limit the kind of conduct about which COMNAV is concerned.

12. Accordingly, we also add language to our rules that will generally allow the installation of cellular mobile telephones aboard aircraft. *See* Appendix B. Where telephones are installed, however, we will require that a notice be posted adjacent to the telephones stating that: "The use of cellular telephones while this aircraft is airborne is prohibited by FCC rules and the violation of this rule could result in suspension of service and/or a fine. The use of cellular telephones while this aircraft is on the ground is subject to FAA regulations."[14] We believe that this notice is necessary to inform all cellular telephone users aboard aircraft that the use of cellular telephones while airborne is prohibited. Finally, Section 22.911(a)(1) will require that all cellular telephones on board aircraft, including portable installed units, must be turned off once the aircraft is airborne. We believe that the public interest requires this limitation to assure that no incoming telephone calls are received. Incoming telephone calls could cause the mobile unit to transmit automatically, thereby creating the same interference as if the calls originated in the airborne aircraft. Moreover, any call permissibly underway during periods on the the ground must be terminated once the aircraft is airborne. Of course, the airline, pilot or FAA may require a customer to cease using a cellular telephone at any earlier point in accordance with their own policies.

13. We emphasize that the rules which we adopt today with regard to the use of cellular telephones on board aircraft are subject to FAA guidelines. Therefore, neither cellular carriers nor their subscribers can demand to use cellular service aboard aircraft if the FAA has proscribed such use, and any use is specifically subject to all FAA regulations.

## III. CELL ENHANCERS

### A. Background

14. The Notice also proposed rules that would allow the routine licensing of cell "enhancers" or "boosters," devices that receive, amplify and retransmit the signals of a particular cell site and its mobile units to and from areas of poor coverage. Cell enhancers, commonly used under developmental authority since 1985, have proven to be a cost effective alternative to adding one or more new cell sites to correct problems of poor coverage, thus avoiding the need to reconfigure existing cells. Because the devices have proven successful in solving problems of poor coverage without any documented cases of interference, we believed that it would be in the public interest to adopt new rules governing their use.

### B. Discussion

15. The commenters overwhelmingly support the Commission's proposal to allow the use of cell enhancers on a regular basis rather than pursuant to developmental authority. They agree that these devices offer an economical means of improving service to licensees' existing coverage areas and they suggest that the Commission permit the use of all cell enhancers, consistent with the technical requirements adopted for the cellular service in *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 3 FCC Rcd 7033 (1988) ("*Auxiliary Cellular Services Order*"), *recon.*, 5 FCC Rcd 1138 (1990).

16. Subsequent to the release of the Notice, we adopted new rules which allow cellular licensees the option of utilizing new and innovative technologies in the provision of cellular service. In the *Auxiliary Cellular Services Order*,

3 FCC Rcd at 7034, we stated that the cellular industry will be able to use spectrum more efficiently and provide better service to subscribers through the use of nonconventional equipment. In accordance with the requirements of Section 22.930, adopted in our *Auxiliary Cellular Services Order*,[15] a cellular licensee may currently use cell enhancers not subject to the restrictions specified in our Notice.

17. Accordingly, in view of our flexible cellular rules, the use of cell enhancers will not be limited to the restrictions proposed in our Notice. Rather, cell enhancers will be subject to the same technical limitations specified in Section 22.930 (c) of the rules. Therefore, cell enhancers will be subject to the height-power limitations provided in Sections 22.904 and 22.905. In addition, the emission requirements of Section 22.907 will apply, but only to the extent that those emissions fall outside the specific cellular frequency bands licensed to the operator, i.e., band A or band B. Because cell enhancers may now operate at the same power limits as regular cell site transmitters, they will be used both to fill in areas of poor coverage associated with an existing cell site and as a more economical way to increase coverage in new locations.[16] In view of this broader application of these devices, a more apt descriptive definition is necessary. Accordingly, we will name them "cellular repeaters." *See* Appendix B.

18. All cellular repeaters must be type-accepted before being used.[17] Applications for type-acceptance should be filed pursuant to Parts 2 and 22 of the rules, and should include a report of measurements pertaining to frequency range, maximum output power and modulation techniques. For those cellular repeaters utilizing linear amplifiers, the application for type-acceptance must contain test data demonstrating that any third order intermodulation products remain within the limits prescribed by Section 22.907 of the rules.

19. Applications for cellular repeaters will be considered on the same basis as applications for conventional cell site transmitters. Licensees proposing to operate a cellular repeater where the 39 dBu contour[18] does not extend beyond the authorized Cellular Geographic Service Area (CGSA) may notify the Commission by filing FCC Form 489, pursuant to the requirements of Section 22.117(b) of the rules. Licensees proposing to use a cellular repeater where the 39 dBu contour extends beyond the authorized CGSA must file an FCC Form 401 application and obtain prior Commission authorization before commencing operation.[19] The information accompanying each application should be identical to the information submitted when applying for a conventional cell site facility, with an additional exhibit indicating that the application is for a cellular repeater. Filing fees are identical to an application for a cell site in accordance with Section 1.1105 of the Commission's rules.

20. In our Notice we proposed that any licensee using a cellular repeater notify all other carriers operating within the same Metropolitan Statistical Area (MSA), New England County Metropolitan Area (NECMA) or Rural Service Area (RSA), specifying the use and location of the repeater. A number of commenters opposed this requirement, claiming that it would be disadvantageous to disclose such information to their competitors. Because cellular repeaters must be type-accepted and are subject to the same power and emission limitations as standard cellular base stations, we find no reason to treat a cell repeater differently than a regular cellular base station. Therefore we will not require this notification. However, cellular repeaters will be subject to the standard frequency coordination procedures described in Section 22.902(d) of the rules.

21. Finally, we note that on May 24, 1988, the staff issued a Public Notice (Report No. CL-88-113) stating that all current developmental authorizations for cell enhancers, all of which are for service within existing CGSAs, would be extended until the Commission developed standards for their use on a non-developmental basis. Existing developmental authorizations for cellular repeaters will expire one year from the effective date of this *Report and Order*. There will be no grandfathering, so that all such equipment must be replaced with type-accepted cellular repeaters and licensees must submit an FCC Form 489 to obtain permanent authorization for their equipment, as required by Section 22.117 of our rules.

## IV. CONCLUSION

22. The rules adopted in this *Report and Order* codify our present policy prohibiting the use of cellular telephones on board airborne aircraft. In addition, the new rules permit the on-ground use and installation of cellular telephones in aircraft subject to FAA rules and guidelines. Finally, consistent with the Commission's decision in the *Auxiliary Cellular Service Order*, we are adopting rules governing the use of cellular repeaters.

## V. ORDERING CLAUSES

23. Authority for the rule changes adopted herein is contained in Sections 1, 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r).

24. Accordingly, IT IS ORDERED that Part 22 of the Commission's rules IS HEREBY AMENDED as set forth in Appendix B below.

25. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 60 days from the date of publication in the Federal Register.

26. For further information, contact Michael Ferrante ((202) 653-5560) or Dan Abeyta ((202) 632-6450), Mobile Services Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX A

**Parties Commenting on Notice of Proposed Rule Making**

ALLTEL Mobile Communications, Inc. (ALLTEL)

Antenna Specialists Co.

ASTRONET Corporation (ASTRONET)

Bell Atlantic Mobile Systems, Inc. (Bell Atlantic)

BellSouth Corporation

Cellular Telecommunications Industry Association (CTIA)

COM/NAV Marine, Inc. (COM/NAV)

GTE Corporation

McCaw Cellular Communications, Inc. (McCaw)

National Business Aircraft Association

National Telephone Cooperative Association (NTCA)

NYNEX Mobile Communications Company

PacTel Cellular (PacTel)

Providence Journal Telecommunications, Inc. (Providence)

Peninsula Engineering Group, Inc. (Peninsula Engineering Group)

Southwestern Bell Mobile Systems, Inc. (Southwestern Bell)

Telecommunications Industry Association

Telocator

U S West NewVector Group, Inc. (NewVector)

**Reply Comments**

Cellular Telecommunications Industry Association

GTE Corporation

McCaw Cellular Communications, Inc.

NYNEX Mobile Communications Company

Southwestern Bell Mobile Systems, Inc.

Telocator

**Additional Parties Commenting on FAA Letter of November 27, 1989**

Air Transport Association

Aloha Airlines

American Airlines

Cincinnati Microwave Communications

Delta Air Lines, Inc.

Eastern Airlines

General Cellular Corporation

International Air Transport Association

Northwestern Airlines

Pan Am World Airways

Rollins, Inc.

Sky Cell Corporation

TWA

Air Transport Association of America

Federal Aviation Administration

Aircraft Owners and Pilots Association

Airline Pilot Association

## APPENDIX B
## AMENDED RULES SECTION

Title 47, Part 22 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

**Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; (47 U.S.C. 154, 303).**

2. Section 22.2 is amended by adding a new definition in alphabetical order to read as follows:

**Section 22.2 Definitions.**

* * * * *

Cellular Repeater. A fixed station in the Domestic Public Cellular Radio Telecommunications Service which retransmits the transmissions of a particular cell site, with or without frequency translation.

* * * * *

3. Section 22.904 is revised to read as follows:

**Section 22.904 Power limitations.**

Stations in this service shall not be permitted to exceed the effective radiated power indicated below.

| | Watts (ERP) |
|---|---|
| Base stations | 500 |
| Mobile stations | 7 |
| Auxiliary test stations | 7 |
| Cellular Repeaters | 500 |

4. Section 22.911 is amended by adding paragraph (a)(1) to read as follows:

**Section 22.911 Permissible communications.**

(a) * * *

(1) Cellular telephones shall not be operated in airplanes, balloons or any other aircraft capable of airborne operation while airborne. Once the aircraft is airborne, all cellular telephones on board such vehicles must be turned off. The term "airborne" means the aircraft is not touching the ground. Cellular telephones may be installed in aircraft. A cellular telephone which is installed in an aircraft must contain a posted notice which reads: "The use of cellular telephones while this aircraft is airborne is prohibited by FCC rules, and the violation of this rule could result in suspension of service and/or a fine. The use of cellular telephones while this aircraft is on the ground is subject to FAA regulations."

* * * * *

5. Section 22.912 is amended by adding new paragraph (c) to read as follows:

**Section 22.912 Responsibility for operational control and maintenance of mobile stations.**

* * * * *

(c) A cellular carrier may either refuse or terminate service to a subscriber, in accordance with any applicable local requirements for timely notification, for using a cellular telephone in an airborne aircraft in violation of Section 22.911(a)(1).

6. Section 22.930 is amended by adding a last sentence to paragraph (d) to read as follows:

**Section 22.930 Special provisions for alternative cellular technologies and auxiliary services.**

* * * * *

(d) * * * For purposes of this paragraph, cellular repeaters will be treated as a cellular facility.

## APPENDIX C

## FINAL REGULATORY FLEXIBILITY ANALYSIS

**I. Need and purpose of this action:**

With respect to the use of cellular units in aircraft, the rule adopted clarifies our policy in this area and prevents a potential interference source. As for the use of cell repeaters, our objective is to facilitate the rapid introduction of advanced cellular technologies in the Domestic Public Cellular Radio Telecommunications Service.

**II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:**

No comments were raised in response to the Initial Regulatory Flexibility Analysis. Several parties suggested modification or clarifications to the proposals set forth in the Notice. As a result of these comments, we have adjusted our proposals as appropriate.

**III. Significant alternatives considered:**

The regulatory burdens we have retained are necessary to carry out our duties under the Communications Act of 1934, as amended. We will continue to examine alternatives in the future with the objective of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. A copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

## FOOTNOTES

[1] *Amendment of Sections of Part 22 of the Commission's Rules in the Matter of Airborne Use of Cellular Units and the Use of Cell Enhancers in the Domestic Public Cellular Radio Service, Notice of Proposed Rulemaking,* 3 FCC Rcd 5265 (1988). Late-filed pleadings, and motions for acceptance thereof, were filed by the National Business Aircraft Association and NYNEX Mobile Communications Company. These motions were unopposed and we grant them in the interest of obtaining a complete record upon which to base our decisions in this proceeding.

[2] *See* Appendix A for a listing of commenters and abbreviations used herein.

[3] Letters from Associate Administrator for Airways Facilities, FAA, to Chief, Mobile Services Division, Common Carrier Bureau (November 27, 1989 and September 19, 1991). The public was made aware that the FAA had corresponded with the FCC concerning the use of cellular telephones in aircraft and several parties filed comments in response to the FAA's first letter. *See* Public Notice, "Notice to File Comments on FAA Concerns Regarding the Use Of Cellular Telephones in Aircraft" (December 18, 1989).

[4] Although not all comments are discussed in this R&O, we have analyzed all of the arguments contained in the comments filed in this Rule Making proceeding.

[5] Section 22.509(b)(2) of the Commission's rules specifically limits the operation of airborne mobile stations governed by Part 22 to the frequencies listed in Section 22.521. Section 22.521 also specifies the operating parameters of the air-ground radiotelephone service for common carriers, which utilizes certain frequencies in the 454 MHz band. Air-ground radiotelephone service provides a public radio service between a base station and airborne mobile stations.

[6] In an effort to satisfy the public's radiotelephone needs, the Commisison recently adopted rules establishing an air-ground radiotelephone service that operates in the 849-851/894-896 MHz frequency bands. *See* Amendment of the Commisison's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, 5 FCC Rcd 3861 (1990), *recon.*, 6 FCC Rcd 4582(1991). This service is capable of operating while the aircraft is airborne or on the ground.

[7] The Notice stated that we would continue to follow the guidelines set forth in the October 11, 1984 Public Notice pending the conclusion of this Rule Making proceeding.

[8] We point out that Section 22.210 of our rules provides that during periods of emergencies, i.e., when normal communication facilities are disrupted as a result of hurricane, flood, earthquake, or similar disaster, a licensee of any station in the Public Mobile Services may utilize that station for emergency communication service provided it complies with the requirements of Sections 22.210(a)-(e).

[9] Letter from Associate Administrator for Airways Facilities, FAA, to Chief, Common Carrier Bureau (November 27, 1989).

[10] On December 18, 1989 the Commission issued a Public Notice soliciting comments on the FAA letter. We received 23 comments and 5 reply comments. Twelve parties favor the on-ground use of cellular telephones in aircraft, arguing that the FAA position is not based on empirical evidence. Eleven comments were received from various airlines and aviation associations, all supporting the views expressed in the FAA letter.

[11] We note that Section 91.19 of the FAA's rules already governs the operation of all portable electronic devices on aircraft. 14 C.F.R. Section 91.19 This rule provides in pertinent part that the operation of any portable electronic device is not allowed on any United States registered aircraft unless the air carrier or commercial operator in the case of commercial aircraft or the pilot in command in the case of other aircraft determines that the use of such devices will not cause interference with the navigation or communication systems on the aircraft on which the devices are to be used.

[12] In addition, no evidence was presented showing that the installation and use of cellular telephones in aircraft might interfere with the air-to-ground radiotelephone system installed in the same aircraft because cellular service and air-to-ground radiotelephone service operate on different frequencies.

[13] We note that a section 503 forfeiture proceeding against a non-licensee or non-applicant can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. § 503(b)(5). *See also* Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991).

[14] *See* Section 22.911(a)(1) of the rules. In order to discourage violations of this rule, we adopt a new rule section that provides: "A cellular carrier may either refuse or terminate service to a subscriber, in accordance with any applicable local requirements for timely notification, for using a cellular telephone in an airborne aircraft . . . ." *See* Section 22.912(c). Violations of this rule are also punishable under Section 502 of the Act.

[15] Section 22.930 specifies the application filing procedures and requirements concerning the use of devices employing new technologies and nonconventional equipment in the cellular radio service.

[16] A number of commenters in our Notice request that the Commission act as expeditiously as possible to initiate an additional Rule Making proceeding to address the use of high-powered cell enhancers. However, the adoption of the *Auxiliary Cellular Services Order* obviates the need for such a proceeding. Accordingly, this request is dismissed as moot.

[17] Several parties recommend that the Commission adopt rules allowing cell repeaters to be eligible for authorization through the notification procedures specified in Section 2.975 of the rules. We will adhere, however, to the authorization requirements for nonconventional equipment operating under Section 22.930 because of our need to identify equipment that may cause interference. As noted in *Auxiliary Cellular Services Order, supra,* type-acceptance will also serve to prevent the use and marketing of illegal equipment in the cellular radio service.

[18] The 39 dBu figure set forth in Section 22.903 of the rules refers to the electric field strength by which a carrier's service area is defined. We recently released a Further Notice of Proposed Rule Making which addresses the issue of whether 39 dBu contours should continue to be used to represent reliable cellular coverage. *See* Rules for Unserved Areas (Further Notice of Proposed Rule Making), Mimeo # FCC 91-311, adopted September 30, 1991. Therefore, the rules that we adopt today will remain in effect pending the final decision in that proceeding.

[19] Section 22.930(d) states that the 39 dBu contours of auxiliary service facilities will not be considered when demonstrating the 75 percent coverage requirement specified in Section 22.903. We will, however, modify Section 22.930 to allow the 39 dBu contour of a cell repeater, as calculated according to Section 22.903 of the rules, to be considered as part of a cellular system's coverage area, in the same way we consider conventional cell transmitters. *See* Section 22.903(d) in Appendix B.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-479**

In the Matter of

Quests, Inc.
Linesville, Pennsylvania

Licensee of Radio Station
WAST(AM), Ashtabula, Ohio

Order to Show Cause Why the
License of Station WAST(AM)
Ashtabula, Ohio, Should
Not Be Revoked

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 20, 1991; Released: December 30, 1991**

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, has for consideration a Petition for Reconsideration (hereinafter, "petition") of the Bureau's *ORDER OF REVOCATION*, 6 FCC Rcd 3385 (1991) (hereinafter, *"ORDER"*), filed by Phillip J. Cantagallo (hereinafter, "Cantagallo") on July 10, 1991.[1]

**BACKGROUND**

2. The *ORDER* revoked the license of Quests, Inc. (hereinafter, "Quests") for station WAST(AM), Ashtabula, Ohio. The licensee failed to file a written notice of appearance and did not appear at the prehearing conference. Thus, it failed to participate in the proceeding and waived its right to a hearing scheduled pursuant to the *ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER*, 5 FCC Rcd 6599 (1990). The revocation was predicated on the facts that: following a denial by the Commission of a request for continued silence authority, the station has been off the air since May 30, 1984, without permission and has not turned in its license as required by Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules; the licensee does not maintain an address in Ashtabula; and, the licensee no longer possesses the station's real or broadcast related property and is incapable of operation.

3. The *ORDER* also dismissed as moot an Application for Consent to Assignment of Broadcast Station License (File No. BAL-901113ED) (hereinafter, "assignment application"), filed November 13, 1990. The assignment application proposes the transfer of WAST(AM) from the major stockholder of Quests, Arthur W. Cervi, Sr., to Cantagallo. Cantagallo holds 65% of the stock of WAQI, Inc., which holds 44% of the stock in Quests. In dismissing the assignment application, the *ORDER* acknowledged that the proposed assignee claimed that the minority stockholders have been blameless in the matter of any FCC violations and that the assignor lacks the resources and desire to put the station back on the air. However, the *ORDER* noted that Cervi has furnished no written statement in mitigation or even explanation of the violations and that no information was submitted indicating that the minority stockholders would be capable of returning the station to the air.

4. Cantagallo submits that, with one exception, the facts underlying this proceeding are undisputed. As to the one exception, Cantagallo asserts that the Bureau's finding that "no information was submitted indicating that the minority stockholders would be capable of returning the station to the air" is a gross error of fact. Cantagallo asserts that there historically has been serious discord between Quests' majority stockholder Cervi and its minority stockholders, whom he represents. He then provides a history of the minority stockholders' past efforts to obtain relief from the Commission and to be permitted to take action to return the station to the air, up to and including the November 13, 1990, assignment application. In light of his showing, Cantagallo asserts that the Bureau erred when it dismissed the assignment application on the grounds that the minority stockholders had not demonstrated the ability to return the station to the air. He also asserts that the minority stockholders should not be held to account for Quests' violations of Sections 73.1740(a) and/or 73.1750 of the Commission's Rules relating to WAST's unauthorized silence, since they lacked the necessary control over the licensee. Finally, he states that restoration of the license and its assignment to the minority stockholders is in the public interest since it will ensure that service is restored.

**DISCUSSION**

5. Cantagallo argues that he has standing as the proposed assignee. We agree. Since he was adversely affected in his capacity as the proposed assignee, by the *ORDER*'s dismissal of the assignment application, he is an interested person and, as such, has standing. Section 1.106(b)(1) of the Commission's Rules.

6. Section 1.106(c) of the Commission's Rules provides that a petition for reconsideration will be entertained only if it relies on newly discovered facts or if consideration of the facts relied on is in the public interest. The Bureau has carefully reviewed Cantagallo's petition and concludes that it does not satisfy the Rule's requirements. Specifically, Cantagallo has provided no newly discovered facts or public interest considerations relative to the revocation of Quests' license. Rather, Cantagallo's petition focuses almost exclusively on his desire to have Quests' license assigned to the minority stockholders. Thus, reconsideration of the revocation of Quests' license is unwarranted.

7. Reconsideration of the dismissal of the assignment application is also unwarranted. Critical to the disposition of Cantagallo's request to have the license assigned to the minority stockholders "is the recognized policy of the

[1] In his petition, Cantagallo requests withdrawal of his June 12, 1991, informal request for reconsideration. The request is granted.

Commission that assignment of [a] broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited his authorization." *Jefferson Radio Inc., v. FCC*, 2 RR 2d 2090, 2092, 340 F.2d 781, 783 (D.C. Cir. 1964). A solid line of cases affirms the doctrine that a licensee found unqualified cannot assign its license. *See, Stereo Broadcasters, Inc.*, 74 FCC 2d 543 (1979), *aff'd Stereo Broadcasters, Inc. v FCC*, 652 F.2d 1026, 49 RR 2d 781 (D.C. Cir. 1981) and cases cited therein. In the instant case, Quests' license was revoked. Accordingly, there was nothing to assign and the *ORDER* properly dismissed the assignment application as moot. Finally, to the extent that the *ORDER* discussed the failure of the minority stockholders to demonstrate their ability to return the station to the air, those comments were dicta. Therefore, Cantagallo's argument that the Bureau erred in its finding about the minority shareholders is irrelevant.

8. ACCORDINGLY, pursuant to Section 1.106(j) of the Commission's Rules, IT IS ORDERED that the Petition for Reconsideration filed by Phillip J. Cantagallo, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

Richard M. Firestone
Chief, Common Carrier Bureau

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3387

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: December 19, 1991; Released: December 19, 1991**

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3387 to modify Virtual Telecommunications Network Service (VTNS) Option 15 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Transmittal 3387 clarifies that any agreement between AT&T and the customer to reduce data transmission capabilities to less than 80 percent of their initial level must be filed in the tariff. *See* AT&T Transmittal No. 3387 at 1, 3. The transmittal is scheduled to take effect December 20, 1991.

2. MCI Telecommunications Corporation filed a petition to reject these modifications to Option 15, on August 27, 1991; AT&T filed a reply on September 3, 1991.

3. MCI claims that the Commission, at its meeting on August 1, 1991, found that because the lack of 800 number portability remains a barrier to full competition in 800 services, AT&T should be precluded from bundling 800 services with other services in these Tariff 12 contracts. MCI Petition at 2. MCI asserts that the proposed modifications in Transmittal 3387 were not pending as of August 1, 1991. *Id.* Accordingly, says MCI, Transmittal 3387, which modifies a Tariff 12 option that contains bundled inbound calling, should be rejected. *Id.* at 2-6.

4. AT&T replies that the modifications in Transmittal 3387 clarify that any agreement between AT&T and the customer to reduce data transmission capabilities must be filed in the tariff. AT&T Reply at 1-2. Moreover, says AT&T, these changes are merely ministerial corrections that do not affect inbound transmission capabilities and, therefore, should be permitted to take effect. *Id.* at 4-5.

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3387, the petition filed by MCI and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3387 filed by MCI Telecommunications Corporation, IS DENIED.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3383

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: December 19, 1991; Released: December 19, 1991**

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3383 to introduce Virtual Telecommunications Network Service (VTNS) Option 86 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. This transmittal is scheduled to take effect December 20, 1991.

2. MCI Telecommunications Corporation filed a petition to reject these modifications to Option 86, Transmittal 3383, on August 28, 1991. AT&T filed a reply on September 3, 1991.

3. MCI claims that the Commission, at its meeting on August 1, 1991, found that because the lack of 800 number portability remains a barrier to full competition in 800 services, AT&T should be precluded from bundling 800 services with other services in these Tariff 12 contracts. MCI Petition at 2. MCI asserts that the proposed modifications in Transmittal 3383 were not pending as of August 1, 1991. *Id.* Accordingly, says MCI, Transmittal 3383, which modifies a Tariff 12 option that contains bundled inbound calling, should be rejected. *Id.* at 2-6.

4. AT&T replies that the modifications in Transmittal 3383 correct the inadvertent omission of 9.6 kbps and below data transmission capabilities from the data transmission capabilities/voice transmission capabilities (DTC/VTC) pricing plan. AT&T Reply at 1. Moreover, says AT&T, these changes are merely ministerial corrections that do not affect inbound transmission capabilities and, therefore, should be permitted to take effect. *Id.* at 4. Consequently, says AT&T, these revisions should be permitted to take effect. *Id.* at 4-5.

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3383, the petition filed by MCI, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3383 filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3375

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: December 19, 1991; Released: December 19, 1991**

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3375 to modify Virtual Telecommunications Network Service (VTNS) Option 36. VTNS modified Option 36 is described as a generally available offering designed and engineered for voice and data communications service among stations in the U.S., Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 36: add data transmission capabilities (DTCs) at additional speeds; allow customers to place calls using Type I authorization codes; modify the rate schedules to provide for calls placed with a Type I authorization code, and modify the calling matrix to reflect the new calling capability; decrease the basic charge from $1.010,981 per month to $996,171 per month, and reduce the basic charge by $307,000 for the first full month of service following December 14, 1991 or for the first full month of service following the initial service when Option 36 is ordered prior to April 30, 1992 with an initial service date not later than July 30, 1992; modify the international usage volume pricing plan; modify the domestic DTC and voice transmission capability (VTC) volume pricing plan; modify the change charge provisions; modify the outage credit units; and make certain textual changes. *See* AT&T Transmittal No. 3375 Description and Justification (D&J) at 2-5. Transmittal 3375 is scheduled to take effect on December 12, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject modified Option 36, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate modified Option 36 on September 3, 1991. AT&T filed a reply on September 12, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 36.[2] In the *Interexchange Order*, the Commission determined that, pending 800 number portability, 800 or inbound services cannot be legally bundled with other services, but "grandfathered" existing options. *Interexchange Order* at para. 149. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 36, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 36 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. MCI argues that any modification of a Tariff 12 service arrangement must be viewed as changing the core offering. MCI Petition at 3. Therefore, says MCI, since these revisions would alter an existing Tariff 12 core offering that bundles inbound calling, Transmittal 3375 must be summarily rejected because it would conflict with the August 1 prohibition. *Id.* at 3-4. CompTel insists that these modifications are objectionable because they are material. CompTel Petition at 1.

5. Sprint asserts that the changes in Transmittal 3375 are not being made to serve the current customer but to make this offering more attractive to other customers and thereby avoiding the Commission's prohibition on bundling of inbound service. Sprint Petition at 2-4. Sprint insists that if the Commission continues to permit AT&T to revise existing "grandfathered" options with an inbound component the grandfathering provision will be rendered more loophole than rule. *See* Sprint Petition at 3.

6. Williams argues that AT&T has failed to demonstrate that modified Option 36 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 36 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

7. AT&T replies that this filing makes no fundamental change to Option 36; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3375 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2.

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

8. In response to the claims of Sprint and Williams that these revisions expand the scope of 800 bundling, AT&T asserts that these modifications make no change to rate schedules D or E, which apply for inbound calling, or any other change that affects inbound capabilities. *Id.* at 4. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 36 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

9. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 36 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

10. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

11. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3375, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 36, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

12. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3375, IS REJECTED.

13. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3375, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3375, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

14. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1091 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

15. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than 5 business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order, supra,* note 1; *id.* The November 25 Order extended the grandfathering date to include Tariff 12 options filed immediately after the August 1 decision because of the unique circumstances underlying those new Tariff 12 options. Footnote 9 of the November 25 Order states: "Because AT&T did not file any additional Tariff 12 options after August 8, our concerns about the arbitrariness of alternative grandfathering dates are mitigated insofar as there will be no need to consider additional options." The Commission concluded that its limited extension of the grandfathering date "would allow only this small number of additional Tariff 12 options to become effective." November 25 Order at 3. While no additional Tariff 12 options had been filed after August 8, proposed modifications to existing options, such as Transmittal 3375, had been filed and were pending. By the November 25 Order, the Commission did not include the pending modifications filed after August 8 within the revised grandfathering provision.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3396

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: December 20, 1991; Released: December 20, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3396 to modify Virtual Telecommunications Network Service (VTNS) Option 28. VTNS modified Option 28 is described as a generally available offering designed and engineered for voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 28: expands the calling capabilities to include Measured Ports; revises the Measured charges rate schedules to reflect calls using Measured Ports; modifies the Changes section to include Measured Ports; reduces the Basic Charge; removes a charge imposed on AT&T when Service Element installation is delayed; modifies the minimum Service Element requirements; and increases discount levels in the Data Transmission Capability Volume Pricing Plan. AT&T Transmittal No. 3396 Description and Justification (D&J) at 2-5. Transmittal 3396 is scheduled to take effect on December 21, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject modified Option 28, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate modified Option 28 on September 10, 1991. AT&T filed a reply on September 19, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 28.[2] Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 28, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 28 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. MCI argues that any modification of a Tariff 12 service arrangement must be viewed as changing the core offering. MCI Petition at 3. Therefore, says MCI, since these revisions would alter an existing Tariff 12 core offering that bundles inbound calling, Transmittal 3396 must be summarily rejected because it would conflict with the August 1 prohibition. *Id.* at 3-4. CompTel insists that these modifications are objectionable because they are material. CompTel Petition at 1.

5. Sprint asserts that the changes in Transmittal 3396 are not being made to serve the current customer but to make this offering more attractive to other customers, thereby avoiding the Commission's prohibition on bundling of inbound service. Sprint Petition at 2-4. Sprint insists that if the Commission continues to permit AT&T to revise existing "grandfathered" options with an inbound component the grandfathering provision will be rendered "more loophole than rule." *See* Sprint Petition at 3.

6. Williams argues that AT&T has failed to demonstrate that modified Option 36 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 28 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

7. AT&T replies that this filing makes no fundamental change to Option 28; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3396 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2.

8. In response to the claims of Sprint and Williams that these revisions expand the scope of 800 bundling, AT&T asserts that these modifications make no change to rate schedules D or E, which apply for inbound calling, or any other change that affects inbound capabilities. *Id.* at 4. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 28

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

9. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 28 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

10. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

11. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3396, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 28, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

12. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3396, IS REJECTED.

13. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3396, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3396, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

14. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1136 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

15. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than 5 business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order, supra,* note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-584**

In re Applications of

| | |
|---|---|
| EDWIN A. BERNSTEIN | File No. BPH-870330NC |
| RADIO CENTER MORICHES LIMITED PARTNERSHIP | File No. BPH-870331MV |
| DAKK, INC. | File No. BPH-870331ND |
| FRIENDSHIP COMMUNICATIONS, LTD. | File No. BPH-870415KS |
| HAMPTONS COMMUNICATIONS LIMITED PARTNERSHIP | File No. BPH-870415KY |

For Construction Permit for New FM Station, Channel 241A, Center Moriches, New York

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: December 20, 1991; Released: January 3, 1992**

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. By *Memorandum Opinion and Order*, FCC 91R-105, released November 20, 1991, the Review Board designated the following issues for further hearing:

(1) To determine whether DAKK has violated Section 1.65 of the Commission Rules, and whether any such violation reflected a deliberate attempt to conceal;

(2) To determine whether DAKK lacked candor in its prosecution of this case or in pleadings filed in this proceeding.

2. In its *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1990), *on reconsideration*, 6 FCC Rcd 3403 (1991), the Commission mandated that, in any case where the issues are enlarged to ascertain if the applicant has made misrepresentations to the Commission or engaged in other misconduct during the application process, a notice shall be given "after hearings on the enlarged issues, and upon a finding that the alleged misconduct occurred and warrants such a penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount." 6 FCC Rcd at 164.

3. DAKK, Inc. is hereby notified pursuant to 47 CFR § 1.80(f)(1), that it may have violated 47 CFR § 1.117 (duty to submit truthful written statements and responses) and 47 CFR § 73.1015 (applicant shall not submit to the Commission any written statement consisting a misrepresentation or material omission bearing on any matter within the Commission's jurisdiction). DAKK's apparent forfeiture liability would be $20,000 for each such violation, *see generally Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), in lieu of, or in addition to, any other appropriate action.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

**Before the**
**Federal Communications Commission**
**Washington DC 20554**

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-90-02

ILLINOIS BELL TELEPHONE COMPANY,
INDIANA BELL TELEPHONE COMPANY,
MICHIGAN BELL TELEPHONE COMPANY,
OHIO BELL TELEPHONE COMPANY, and
WISCONSIN BELL, INC.,
Defendants.

**ORDER**

**Adopted: December 26, 1991; Released: January 3, 1992**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaint alleging that defendants' rates for 1988 were unjust and unreasonable in violation of 47 U.S.C. § 201(b). AT&T maintained defendants had overstated their interstate revenue requirements. On December 10, 1991, the parties filed a joint motion to dismiss the complaint. They state that they have reached a settlement which disposes of all issues in controversy in the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington D. C. 20554**

**MM Docket No. 91-272**

In the Matter of

Amendment of Section 73.202(b), RM-7326
Table of Allotments,
FM Broadcast Stations.
(Trinity, Texas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 19, 1991; Released: January 6, 1992**

By the Assistant Chief, Allocations Branch:

1. At the request of Roy E. Henderson, d/b/a Trinity Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5541 (1991), proposing the allotment of Channel 251A to Trinity, Texas, as that community's first local FM service. Petitioner subsequently filed a request for withdrawal of its petition for rule making. [1] No other expressions of interest were filed.

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal.

3. Accordingly, IT IS ORDERED, That the petition for rule making of Roy E. Henderson, seeking the allotment of Channel 251A to Trinity, Texas (RM-7326), IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner states that he has not been paid or promised any consideration, directly or indirectly, in exchange for the withdrawal of his expression of interest.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-361**

In the Matter of

Amendment of Section 73.202(b), RM-7502
Table of Allotments,
FM Broadcast Stations.
(Houma and Chalmette,
Louisiana)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: December 19, 1991; Released: January 6, 1992**

**Comment Date: February 27, 1992**
**Reply Comment Date: March 13, 1992**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Guaranty Broadcasting Corporation ("petitioner"), licensee of Station KCIL(FM), Channel 298C1, Houma, Louisiana, requesting the reallotment of Channel 298C1 from Houma to Chalmette, Louisiana, as the community's first local transmission service, and the modification of Station KCIL(FM)'s license to specify Chalmette as its community of license. In addition, petitioner proposes the allotment of Channel 296A to Houma, Louisiana. Petitioner states that it will apply for Channel 298C1 at Chalmette and Channel 296A at Houma, Louisiana.

2. Petitioner seeks modification of Station KCIL(FM)'s license pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the licensee of an existing station to specify a higher class channel and/or a new community of license without affording other interested parties an opportunity to file competing expressions of interest.[1] Petitioner advises that the requested reallotment to Chalmette is mutually exclusive with the existing allotment of Channel 298C1 at Houma. Petitioner asserts that the adoption of its proposal will result in a preferential arrangement of allotments by bringing a first local transmission service to Chalmette while Houma would retain local aural transmission service from one FM and one AM station.[2] In support of its request, petitioner argues that the reallotment of Channel 298C1 to Chalmette would enable Station KCIL(FM) to serve more than 1,350,000 persons, while its current use at Houma provides service to 247,282 persons. In addition, petitioner states that the reallotment of Channel 298C1 to Chalmette would allow the allotment of Channel 296A to Houma, thereby permitting Houma to maintain two local FM services.[3]

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. In this case, petitioner claims that its proposal would provide a first local broadcast service to Chalmette, and would not deprive Houma of local service. However, we note that Chalmette is located within the New Orleans Urbanized Area, and Houma is within the Houma Urbanized Area, as defined by the U.S. Census. We question whether Chalmette is deserving of a first FM service preference, or whether Chalmette should be credited with all of the aural services authorized to communities within the New Orleans Urbanized Area. Therefore, petitioner is requested to submit information sufficient to show that Chalmette is deserving of a first local preference.[4]

4. We note that petitioner asserts that its proposal would provide service to more persons if reallotted to Chalmette than it currently serves at Houma, as well as a second local FM service at Houma. However, we are concerned that loss of service to a segment of Houma's population could occur, as petitioner seeks to replace a Class C1 station at Houma with a Class A facility. Therefore, we request petitioner to submit information regarding any loss of service that would result from this proposal to those persons located within the existing service area of Station KCIL(FM), Channel 298C1, Houma. We also request information as to the extent that this loss area could eventually be compensated by the allotment of Channel 296A to Houma. In addition, we request petitioner to submit information concerning the populations and services available within the predicted gain areas of the proposed reallotment of Channel 298C1 to Chalmette. Finally, we request petitioner to submit any additional information as to the overall public interest benefits that would be advanced from the grant of this proposal.

5. Channel 298C1 can be reallotted from Houma, Louisiana, to Chalmette, Louisiana, in compliance with the minimum distance separation requirements with a site restriction of 6.1 kilometers (3.8 miles) west to accommodate petitioner's desired transmitter site. Channel 296A can be allotted to Houma with a site restriction of 11.9 kilometers (7.4 miles) south to avoid a short spacing to Station WHMD(FM), Channel 296A, Hammond, Louisiana.[5] As requested, we also propose to modify petitioner's license for Station KCIL(FM) to specify Chalmette as the station's community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept expressions of interest in the use of Channel 298C1 at Chalmette or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

---

[1] *See Modification of FM and TV Authorizations to Specify a New Community of License* (*"Change of Community R&O"*), 4 FCC Rcd 4870 (1989), *recon. granted in part* (*"Change of Community MO&O"*), 5 FCC Rcd 7094 (1990).

[2] Petitioner submits that in addition to KCIL(FM), Houma is the community of license for KHOM(FM) and KJIN(AM).

[3] Petitioner also claims that the change in community could permit the allotment of a channel to Patterson or Amelia, Louisiana, as a first local transmission service. Petitioner does not express an interest in applying for a channel at either community. Therefore, we will not propose such an allotment.

[4] *See Change of Community MO&O*, supra.

[5] The coordinates for Channel 298C1 at Chalmette are North Latitude 29-55-11 and West Longitude 90-01-29. The coordinates for Channel 296A at Houma are North Latitude 29-29-30 and West Longitude 90-44-26.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Houma, Louisiana | 281C, 298C1 | 296A, 281C |
| Chalmette, Louisiana | -- | 298C1 |

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **February 27, 1992,** and reply comments on or before **March 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Carl R. Ramey, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-362**

In the Matter of

Amendment of Section 73.202(b), RM-7873
Table of Allotments,
FM Broadcast Stations.
(Jourdanton, Texas)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: December 19, 1991; Released: January 6, 1992**

**Comment Date: February 27, 1992**
**Reply Comment Date: March 13, 1992**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Seventh Day Christian Group ("petitioner") requesting the allotment of Channel 239A to Jourdanton, Texas, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that Jourdanton is a community of "sufficient size and development" and is listed in the U.S. Census with a population of 3,220 persons.[1] In addition, petitioner notes that Jourdanton is the county seat of Atacosa County, Texas.

3. We believe the public interest would be served by the allotment of Channel 239A to Jourdanton, since it could provide the community with its first local FM service. Channel 239A can be allotted to Jourdanton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Since Jourdanton is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been solicited.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Jourdanton, Texas | -- | 239A |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 27, 1992,** and reply comments on or before **March 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lee J. Peltzman, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

---

[1] According to the 1980 U.S. Census, Jourdanton is an incorporated community and has a population of 2,743 persons.

[2] The city reference coordinates for Channel 239A at Jourdanton are North Latitude 28-54-48 and West Longitude 98-32-36.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-363**

In the Matter of

Amendment of Section 73.606(b), RM-7877
Table of Allotments,
TV Broadcast Stations.
(Springdale, Arkansas)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: December 19, 1991; Released: January 6, 1992**

**Comment Date: February 27, 1992**
**Reply Comment Date: March 13, 1992**

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Total Life Community Educational Foundation ("petitioner") seeking the allotment of UHF television Channel 57 to Springdale, Arkansas, as that community's first local television broadcast service. Petitioner stated its intention to apply for authority to construct and operate a television broadcast station on Channel 57, if allotted to Springdale, as requested.

2. Springdale (population 23,458),[1] in Washington County (population 100,494), is located approximately 230 kilometers (145 miles) northwest of Little Rock.

3. A staff review of the proposal has determined that Channel 57 can be allotted to Springdale consistent with the minimum distance separation requirements of Sections 74.610 and 73.698 of the Commission's Rules without the imposition of a site restriction.[2] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Springdale is not affected thereby.[3]

4. We believe the public interest would be served by proposing the allotment of UHF Channel 57 to Springdale as that community's first local television broadcast service. Accordingly, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, to include the community listed below, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Springdale, Arkansas | | 57 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 27, 1992,** and reply comments on or before **March 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Ashton R. Hardy, Esq.
Bradford D. Carey, Esq.
Craig E. Frosch, Esq.
Walker, Bordelon, Hamlin,
Theriot and Hardy
701 South Peters Street
New Orleans, LA 70130

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

---

[1] Population figures were taken from the 1980 U.S. Census.
[2] Coordinates used for Channel 57 are 36-11-00 and 94-08-18.
[3] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service,* 52 Fed. Reg. 28346, published July 29, 1987. In this instance, the distance from Kansas City, Missouri (the closest of the 30 major markets affected by the freeze), is approximately 320 kilometers (199 miles) from Springdale, whereas a distance of 280.8 kilometers (174.5 miles) is required.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington D. C. 20554**

**MM Docket No. 91-250**

In the Matter of

Amendment of Section 73.202(b), RM-7461
Table of Allotments,
FM Broadcast Stations.
(Gilmer, Texas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 20, 1991; Released: January 6, 1992**

By the Assistant Chief, Allocations Branch:

1. At the request of Curtis Broadcasting Stations, Inc. ("petitioner"), licensee of Station KLSQ(FM), Channel 237A, Gilmer, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5075 (1991), proposing the substitution of Channel 237C3 for Channel 237A at Gilmer, and the modification of Station KLSQ(FM)'s license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the interest would be served by the substitution of Channel 237C3 for Channel 237A at Gilmer, since it would provide the community with a wide coverage area FM service. Channel 237C3 can be allotted to Gilmer in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.2 kilometers (2.6 miles) southeast to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's license for Station KLSQ(FM) to specify operation on Channel 237C3 in accordance with the provisions of Section 1.420(g) of the Commission' Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Gilmer, Texas | 237C3 |

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Curtis Broadcasting Stations, Inc., for Station KLSQ(FM), Gilmer, Texas, IS MODIFIED to specify operation on Channel 237C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237C3 at Gilmer are North Latitude 32-42-02 and West Longitude 94-55-14.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-364**

In the Matter of

Amendment of Section 73.202(b), RM-7780
Table of Allotments,
FM Broadcast Stations.
(Nassawadox, Virginia)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: December 20, 1991; Released: January 6, 1992**

**Comment Date: February 27, 1992**
**Reply Comment Date: March 13, 1992**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Tobacco Country Radio, Inc. ("petitioner"), requesting the allotment of Channel 222A to Nassawadox, Virginia, as the community's first local FM service. In order to accomplish the new allotment at Nassawadox, petitioner also requests the substitution of Channel 285A for Channel 269A at Kilmarnock, Virginia, and the modification of Station WKWI(FM)'s license to specify the alternate channel; and the substitution of Channel 269A for Channel 222A at Deltaville, Virginia, a vacant and unoccupied allotment for which one application is pending. Petitioner states that it will apply for the channel at Nassawadox and will also reimburse the licensee of Station WKWI(FM) for the reasonable costs associated with the change in channel at Kilmarnock. Comments in opposition were filed by Deltaville Communications ("Deltaville"), applicant for a new FM station on Channel 222A, Deltaville, Virginia. Petitioner and Sinclair TeleCable, Inc., licensee of Station WCDX(FM), Mechanicsville, Virginia, filed responsive comments to Deltaville's opposition.

2. Petitioner states that Nassawadox is a community on the eastern shore of Virginia and is listed in the 1980 U.S. Census with a population of 630 persons.[1] In addition, petitioner notes it proposed allotment would provide a new radio reception service to all of Northampton County, including Eastville, the county seat, which currently lacks a local radio transmission service.

3. Deltaville opposes the allotment of Channel 222A to Nassawadox because of the associated substitutions required to accommodate the new allotment. Deltaville notes that it is Commission policy not to make channel substitutions unless absolutely necessary. To this end, Deltaville submits that Channel 250A or Channel 252A are alternate channels available to allot to Nassawadox without the need to substitute channels in any other community. [2]

4. We have confirmed that Channel 250A can be allotted to Nassawadox, Virginia. We believe the public interest would be served by proposing the allotment of Channel 250A to Nassawadox, rather than Channel 222A with the associated substitutions. This channel could provide the community with its first local FM service. Channel 250A can be allotted to Nassawadox in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [3]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Nassawadox, Virginia | -- | 250A |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 27, 1992,** and reply comments on or before **March 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stuart A. Shorenstein, Esq.
Lowenthal, Landau, Fischer,
Ziegler & Bring, P.C.
250 Park Avenue
New York, New York 10177
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and com-

[1] According to the 1980 U.S. Census, Nassawadox is an incorporated community and has a population of 564 persons.

[2] Other issues raised in Deltaville, Sinclair and petitioner's comments will be discussed, to the extent necessary, at a later stage of this proceeding.

[3] The coordinates for Channel 250A at Nassawadox are North Latitude 37-28-24 and West Longitude 75-51-30. We note that petitioner's proposal would have required a 7.0 kilometer (4.4 mile) site restriction north of the community.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COMMUNICATIONS SATELLITE CORP. File No. I-T-C-91-024

Application for authority to provide cable restoration services between the U.S. Mainland and Puerto Rico and the U.S. Virgin Islands.

## ORDER AND AUTHORIZATION

**Adopted: December 24, 1991; Released: January 6, 1992**

By the Chief, International Facilities Division:

1. The above-captioned application, filed by the Communications Satellite Corp. (Comsat), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the Roaring Creek, Pennsylvania and Cayey, Puerto Rico earth stations, via INTELSAT Atlantic Ocean Region (AOR) satellites, for the provision of domestic cable restoration service during cable outages between the U.S. mainland, on the one hand, and Puerto Rico and the U.S. Virgin Islands, on the other hand.

2. The application was placed on public notice on November 15, 1990. Pan American Satellite (PAS) filed comments, requesting that the Commission delay grant of the application until: 1) Comsat files more information concerning its provision of domestic service; and 2) the Commission considers the policy implications of allowing Comsat and other U.S. international satellite facilities providers to offer domestic service. Comsat filed an Opposition to the Comments, noting that it only seeks authority to restore service during an outage of cable facilities used for the provision of international and domestic service. Thus, Comsat views the domestic service as "incendental and ancillary" and notes that PAS is already authorized to provide emergency restoration services[1] and domestic services on an ancillary basis.[2]

3. Upon consideration of Comsat's application and the pleading herein, we find that a grant of the application is required by the public convenience and necessity. Comsat notes that it would provide domestic cable restoration services for those cables that carry both international and domestic service. Since Comsat is already authorized to provide international cable restoration services, we find no compelling reason to require that domestic and international communications carried over the same cable be restored via different facilities. We disagree with PAS that Comsat's request is related to its pending request to provide satellite communications services via the INTELSAT system between the U.S. mainland and the U.S. Virgin Islands. [3] We emphasize that the use of INTELSAT facilities for domestic service is for cable restoration only. We also note that separate systems are not precluded from providing emergency restoration services for domestic cable.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-024 IS GRANTED, and Comsat is authorized to acquire from INTELSAT units of utilization in AOR satellites between the Roaring Creek, Pennsylvania and Cayey, Puerto Rico earth stations for the provision of domestic cable restoration service in the Caribbean region between the U.S. mainland, on the one hand, and Puerto Rico and the U.S. Virgin Islands, on the other hand.

5. IT IS FURTHER ORDERED that the authority granted herein only applies to those cable systems which provide international and domestic service.

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

### FOOTNOTES

[1] *See Separate Systems Report and Order*, 101 FCC 2d 1046 (1985).

[2] *See Separate Systems First Reconsideration Order*, 61 RR 2d 649 (1986).

[3] *See* Application of Communications Satellite Corporation, File Nos. I-T-C-88-025 and I-T-C-88-027.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

NETEXPRESS COMMUNICATIONS, INC. File No. I-T-C-91-129

Application for Authority to acquire and operate facilities for private line service between the U.S. and Japan.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: December 24, 1991; Released: January 6, 1992**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of private line service to Japan by NetExpress Communications, Inc. (Net Express).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-129 IS GRANTED and NetExpress is authorized to:

a. lease and operate a one-half interest in two 56-64 Kbps digital circuits between the U.S. and Japan;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilties to provide private line service between the U.S. and Japan.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between NetExpress and its correspondent in Japan and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington DC 20554**

**PUBLIC NOTICE**

**Released: January 6, 1992**

**ALLTEL SERVICE CORPORATION FILES PETITION FOR WAIVER OF THE COMMISSION'S PART 36 RULES REGARDING THE MODIFICATION OF STUDY AREA BOUNDARIES FOR ITS AFFILIATES ALLTEL OF OHIO & ELYRIA TELEPHONE COMPANY**

**PUBLIC COMMENT INVITED**

On December 9, 1991, ALLTEL Service Corporation, on behalf of its operating affiliates, ALLTEL Ohio, Inc., and The Elyria Telephone Company, filed a petition for waiver of the definition of "study area" as set forth in Part 36, Subpart H, Appendix-Glossary of the Commission's Rules, as well as Sections 36.154(e)(1) and (2) and 36.125(f). This waiver would allow ALLTEL's affiliates to make the necessary adjustments to their study area boundaries as a result of a merger.

Parties may file comments on this petition no later than **January 30, 1992.** Replies should be filed by **February 14, 1992.** Comments should reference AAD 91-81. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W. Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Jacqueline Spindler (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington DC 20554**

In the Matter of

United Telephone Company
of Indiana and United Telephone
Company of Ohio

Request for Waiver of the
Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 20, 1991; Released: December 27, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. On April 29, 1991, the United Telephone Company of Indiana and United Telephone Company of Ohio (United) filed a petition for reconsideration of the Order denying United's request for a waiver of the Commission's equal access implementation requirements.[1] Subsequently, United and MCI Telecommunications Corporation (MCI) filed a letter stating that United has accelerated its equal access conversion schedule, and that MCI no longer opposes United's petition for reconsideration. In view of the changed circumstances, in this order we grant United's petition for reconsideration, and waive the Commission's equal access requirements to permit United to implement its new conversion schedule.

## II. BACKGROUND

2. In the *ITC Equal Access Order*, the Commission required the non-GTE independent telephone companies (ITCs) to convert their end offices to equal access only if certain conditions were present.[2] The Commission required these ITCs to convert end offices equipped with stored-program-controlled (SPC) switches within three years of a "reasonable request" for conversion to equal access by an interexchange carrier. The Commission directed the non-GTE ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[3] Moreover, the *ITC Equal Access Order* provided that a non-GTE ITC may seek a waiver of the Commission's rules if such a carrier can "demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[4]

3. On March 28, 1991, the Bureau denied United's petition for waiver, stating that United had "essentially sought an indefinite waiver of the Commission's equal access conversion rules," and had failed to present any information that would confirm United's allegations that the costs of complying with the equal access conversion requirements would outweigh the potential benefits to users.[5] The Order also noted that MCI -- the interexchange carrier requesting equal access -- opposed United's waiver request.

## III. DISCUSSION

4. In its petition for reconsideration, United argues first that the Commission did not intend to subject non-standard stored-program-controlled switches to the three-year equal access conversion period. United asserts that the equal access conversion rules were based on the Commission's experience with Bell Company and GTE switches, which required only software upgrades to provide equal access. United claims that its stored-program-controlled switches cannot easily be converted to equal access.[6] United states that conversion of its ITT 1210 switches is a complex and expensive process requiring major hardware modifications, and would be over 930 percent more expensive than the conversion of an AT&T SPC switch.[7] United claims that its NE (North Electric) NX1E switch is not equal access capable, and must be replaced, just as an electromechanical switch would be replaced, in order to provide equal access. Therefore, United requests that the Commission treat the ITT 1210 and the NE NX1E switches as electromechanical for the purposes of the access conversion requirements.

5. United also argues that the costs of conversion outweigh the potential benefits of equal access to its customers. United states that conversion essentially requires accelerating the replacement of the ITT 1210 and NE NX1E switches, and that customers would be better off if it replaced its older analog switches instead, because the older switches are not capable of providing custom calling features, and have higher maintenance costs than digital switches. United states that channeling capital expenditures away from older analog office conversions would delay equal access functionality and new feature availability at those analog offices, and result in a loss of maintenance expense savings due to delay in the introduction of digital technology.

6. In its comments filed on May 14, 1991 in response to United's petition for reconsideration, MCI opposes United's petition for reconsideration, arguing that the Bureau properly considered and rejected United's allegations that

---

[1] United Telephone Company of Indiana and United Telephone Company of Ohio Request for Waiver of the Commission's Equal Access Implementation Plan for Independent Telephone Companies. *Memorandum Opinion and Order*, 6 FCC Rcd 1796 (1991)(Comm.Carr.Bur.) (*United Order*).

[2] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[3] *See ITC Equal Access Order* at 878, paras. 48-49.

[4] *Id.* at para. 50.

[5] *United Order* at para. 12.

[6] The switches at issue are seventeen ITT 1210 digital SPC switches and one NE NX1E analog SPC switch. Both provide custom calling features, such as call forwarding and call waiting. United states that the NE NX1E switch is no longer manufactured.

[7] United Petition for Reconsideration at 12.

equal access conversion would be cost prohibitive.[8] In addition, MCI challenges United's assertion that the Commission envisioned the conversion process as extending only to SPC switches requiring software upgrades but not hardware upgrades, and states that the Commission was aware that the ITCs had switches that were different from those used by the BOCs.

7. On December 4, 1991, MCI and United filed a joint letter stating that United will accelerate its equal access conversion schedule, and MCI no longer opposes United's waiver request.[9] In the letter, United states that it plans to convert all the end offices designated by MCI in its request by the end of 1996. In addition, in the letter MCI withdraws its opposition to United's petition for reconsideration, and United modifies its petition for reconsideration, to the extent necessary to permit the Bureau to accept the revised equal access conversion schedule.

8. We reject United's argument that the Commission did not intend to impose a three-year conversion requirement on United's SPC switches, but find that granting United a waiver of the Commission's equal access requirements to implement the revised conversion schedule submitted with the *MCI/United Letter* is in the public interest.[10] We find no merit in United's argument that we should treat the ITT 1210 and NE NX1E switches as electromechanical. The Commission's *ITC Equal Access Order* established a "bright-line" distinction between ITC end offices equipped with SPC switches and ITC offices equipped with electromechanical switches.[11] The Commission devised its ITC equal access implementation requirements with knowledge that heterogeneous SPC equipment exists in ITC end offices, and that certain hardships could arise in the transition to equal access conversion.[12] In light of these circumstances, the Commission established a waiver process so that ITCs would have an opportunity to demonstrate that the costs of equal access interconnection at an SPC-equipped office outweigh the benefits of equal access to subscribers.[13]

9. We conclude that although United has failed to show that a waiver is unnecessary, it has demonstrated that a waiver would be in the public interest. In its pleadings, United sets forth specific circumstances justifying its request and MCI, the only party opposing the waiver, has now withdrawn its opposition to United's petition for reconsideration. Moreover, whereas United's original pleadings requested a seven and one-half year waiver of the Commission's equal access rules, the longest extension requested under United's negotiated conversion schedule is now three and one-half years. We conclude that United has demonstrated that the timetable established by the Commission's rules is not feasible "except at costs that clearly outweigh potential benefits to users."[14]

## IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that the reconsideration petition of United Telephone Company of Indiana and United Telephone Company of Ohio is GRANTED to the extent described herein and is otherwise DENIED.

11. IT IS FURTHER ORDERED that the equal access implementation requirements are WAIVED to the extent described herein.

12. IT IS FURTHER ORDERED that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

## APPENDIX A

**United Telephone Company of Ohio**
**United Telephone Company of Indiana**

**EQUAL ACCESS CONVERSION SCHEDULE**

| INDIANA CENTRAL OFFICES | CONVERSION DATE |
|---|---|
| Jamestown | 9/30/95 |
| Twelve Mile | 10/26/96 |
| Denver | 10/26/96 |
| Roann | 11/30/96 |
| North Judson | 10/28/95 |
| San Pierre | 10/28/95 |
| Knox | 10/28/95 |
| Hamlet | 10/28/95 |
| Trafaler | 12/14/91 |

| OHIO CENTRAL OFFICES | CONVERSION DATE |
|---|---|
| Croton | 12/30/95 |
| Johnstown | 12/30/95 |
| Shelby | 11/30/96 |
| Glenmont | 11/30/96 |
| Holmesville | 11/30/96 |
| Millersburg | 11/30/96 |
| Luckey | 12/28/96 |
| Stoney Ridge | 12/28/96 |
| Madisonburg | 6/25/94 |

[8] *See* MCI Opposition to the Petition for Reconsideration, filed May 14, 1991 (MCI Opposition to Reconsideration). MCI incorporated by reference the analysis contained in its Opposition to United's waiver request, filed January 22, 1991 (MCI Opposition to Waiver).

[9] *See Ex parte* letter from Donald F. Evans, Director, Federal Regulatory Affairs, MCI Telecommunications Corp.; Jay C. Keithley, Vice President, Legal and External Affairs, United Telecommunications, Inc., to Richard M. Firestone, Chief, Common Carrier Bureau, FCC, December 4, 1991. (*MCI/United Letter*).

[10] A copy of the revised conversion schedule is contained in Appendix A. United States Telephone Association (USTA) filed a statement in support of United's Petition for Reconsideration. USTA Supporting Statement, filed May 3, 1991.

[11] *See ITC Equal Access Order* at 878, paras. 48-49.

[12] *See ITC Equal Access Order* at 872-880.

[13] *Id.* at 875, para. 50.

[14] *See ITC Equal Access Order* at para. 50.

**Before the**
**Federal Communications Commission**
**Washington DC 20554**

In the Matter of

US West Communications Tariff F.C.C. No. 1 — Transmittal No. 196

**ORDER**

**Adopted: December 26, 1991; Released: December 27, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. US West Communications (US West) Transmittal No. 196 introduces Extended Digital Service (EDS), a private line service which uses multiplexing equipment to transmit both voice grade and digital data signals over a common 1.544 Mbps circuit. EDS allows a customer to obtain a DS1 channel interface at a customer location and channelized voice grade and digital data equivalent channels at another customer location. This offering also establishes a promotion which waives nonrecurring charges for EDS during the first 90 days the service is available. Tr. 196 at § 7.4.12(A); Description and Justification (D&J) at §§ 1.1.-1.3.

2. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, suspend and investigate a portion of Transmittal 196 on October 15, 1991. MFS argues that US West's 90 day promotional offering -- under which it believes US West will install new facilities at no charge -- will result in a loss of $66,608.70. Therefore, MFS maintains, the promotion is fundamentally at odds with the Commission's price cap rules and with its policies in favor of cost-based pricing. MFS Petition at 2-3. In support of this position, MFS argues that in the recent *Part 69 ONA Order*,[1] the Commission rejected non-cost-based pricing for new services, and stated that the "new services test must be cost-based." *Id.* at 2.

3. MFS further asserts that US West did not attempt to make a showing of competitive necessity or advance any other argument to justify its promotion. *Id.* at 3. MFS states that the one explanation proffered by US West -- that the promotion will drive network offerings toward the digital environment -- appears to indicate strategic pricing, which the Commission specifically has rejected in the price cap regulatory environment. *Id.*

4. US West replies that of the three types of nonrecurring charges associated with initiating EDS, US West intends to waive only one -- the EDS Channel Charge.[2] Reply at 3 and n.7, citing D&J at § 1.3. According to US West, waiver of nonrecurring charges to stimulate demand for a new service is a common practice in both telecommunications and in other businesses. *Id.* at 3. US West also asserts that it will not be harmed by promotional costs which exceed its forecast because these costs vary directly with monthly revenues from new subscribers. *Id.* at 3 and n.9. Furthermore, US West contends, the promotion will have a significant impact on demand for EDS during the first 90 days after its introduction, and will ultimately result in an increase in EDS' net revenues during the first year. *Id.* at 3-4. US West also states that its net revenue test showing includes the costs of its promotional offering and demonstrates that EDS will increase net revenues by $666,514.79 during the first two years of its offering. *Id.* at 4 and n.10.

5. The Common Carrier Bureau has reviewed US West Transmittal No. 196, MFS' petition, and US West's reply. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or alternatively, suspend and investigate US West Communications Tariff F.C.C. No. 1, Transmittal No. 196, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

[2] Citing Tariff F.C.C. No. 1 at § 7.5.16, US West lists the following nonrecurring charges: (i) EDS DS1 Channel Termination Charge; (ii) EDS Channel Charges; and (iii) EDS Optional Feature Charges.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-406**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6745 |
| Table of Allotments, | RM-7255 |
| FM Broadcast Stations. | |
| (Grenada, Artesia, and Okolona, Mississippi)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 30, 1991; Released: January 7, 1992**

By the Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 4 FCC Rcd 6947 (1990), issued at the joint request of Chatterbox, Inc. ("Chatterbox"), licensee of Station WQXB(FM), Channel 261A, Grenada, Mississippi, and WYS Inc. ("WYS"), licensee of Station WZIX(FM), Channel 261A, Artesia, Mississippi. The *Notice* proposed the substitution of FM Channel 261C2 for Channel 261A at Grenada, Mississippi, the modification of the license for Station WQXB(FM) to specify Channel 261C2, the substitution of FM Channel 260C2 for Channel 261A at Artesia, Mississippi, and the modification of the license for Station WZIX(FM) to specify operation on Channel 260C2. Chatterbox and WYS filed supporting comments reaffirming their intentions to upgrade Stations WQXB(FM) and WZIX(FM) to Class C2 facilities, respectively. Charisma Communications Co. ("Charisma") filed a counterproposal. Chatterbox and WYS filed reply comments. Chatterbox also filed reply comments to the Public Notice accepting Charisma's counterproposal.[2] Charisma filed a response to Chatterbox's reply comments accompanied by a motion for acceptance of the response.[3]

2. Charisma, in its counterproposal, proposes the allotment of Channel 260A to Okolona, Mississippi, as that community's first local service. Charisma states that Channel 260A can be allotted to Okolona in compliance with the new minimum distance requirements that became effective on October 2, 1989, with a 12 kilometer site restriction northeast of Okolona. Charisma further notes that this proposal conflicts with the proposal to substitute Channel 260C2 for Channel 261A at Artesia.

3. Charisma contends that its proposal satisfies Priority (3) under the Commission's comparative criteria by providing Okolona with its first local broadcast service. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).[4] Charisma states that Okolona has a population of 3,409 persons and is also one of two county seats of Chickasaw County, which has a population of 17,853 persons.[5] Charisma argues that the Okolona proposal should be preferred over the proposed Artesia upgrade which would extend the secondary coverage area of Station WZIX(FM). Thus, the Artesia upgrade would satisfy only Priority (4). Charisma contends that the Commission's allotment priorities clearly favor a first local service to Okolona over an extended coverage area for Artesia, citing *Atmore, Alabama*, DA 89-1198, released October 3, 1989. Charisma also notes that Artesia already has authorized local service and will continue to have local radio service even if the Artesia upgrade proposal is denied, citing *Savannah and Cameron, Missouri*, DA 89-1319, released November 1, 1989; *Haltom City, Texas*, 4 FCC Rcd 5396 (1989); *Scranton and Surfside Beach, South Carolina*, 3 FCC Rcd 2798 (1988); *recon. denied* 4 FCC Rcd 2366 (1989).[6]

4. Chatterbox, in support of the proposal to substitute Class C2 channels at Grenada and Artesia, argues that this would better serve the public interest than grant of Charisma's counterproposal because the Grenada upgrade would provide gray area service (*i.e.*, second full-time reception service) to 893 people and would provide service to an additional 92,889 people. Further, Chatterbox contends that the Artesia upgrade would provide service to an additional 96,131 people, resulting in a combined gain of 189,020 people between the two upgrades. By way of contrast, Chatterbox alleges that the Okolona proposal would provide service to only 78,000 people and first service to only 3,409 people.

5. Chatterbox concedes that it is possible, as suggested by Charisma in its counterproposal, to allow Grenada to upgrade while allotting a new Class A channel at Okolona. Chatterbox claims that Channel 255A can be substituted for Channel 261A at Artesia for use by Station WZIX(FM) in compliance with applicable spacing requirements. Chatterbox contends that this substitution will permit both the proposed upgrade of Station WQXB(FM) (from Channel 261A to Channel 261C2) and the allotment of Channel 260A to Okolona. Chatterbox states that in the event that the Commission orders the substitution of Channel 255A for Channel 261A at Artesia to permit the upgrade of Station WQXB(FM), it will reimburse the Artesia licensee for its reasonable expenses incurred in making the channel change. If this proposal is considered, Chatterbox requests that the Commission issue

---

[1] The community of Okolona, MS, nas been added to the caption.

[2] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807.

[3] Although Charisma's response was filed after the pleading cycle ended in this proceeding, we will consider it because this will provide a more complete record for resolution of this proceeding. *See* Section 1.425 of the Commission's Rules.

[4] The priorities set forth therein are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

[5] Population figures were taken from the 1980 U.S. Census.

[6] Charisma points out that the conflict between the Grenada and Artesia proposals could be resolved by moving the Artesia station to another Class A channel. Charisma points out that if the conflict between the Grenada upgrade and the current Class A channel at Artesia were eliminated in the above manner, then both the Grenada upgrade and the Okolona allotment could be granted.

to the licensee of Station WZIX an order to show cause why its license should not be modified to specify operation on Channel 255A.

6. Charisma, in response to Chatterbox, argues that in light of the fact that the Grenada upgrade does not conflict with the Okolona proposal and that the Grenada upgrade can be accommodated separately by substituting Channel 255A for Channel 261A at Artesia, the only comparison before the Commission is between a first FM service at Okolona and an alleged increase in secondary service to 96,131 people from the proposed Artesia upgrade. Charisma notes that under the Commission's allotment priorities, a first local service to Okolona would prevail over the new reception service offered by Artesia. Charisma contends that the Grenada showing of a second aural service to 893 persons has no relevance to the comparison since that service can be achieved consistent with the adoption of the Okolona proposal. Charisma argues that since the Grenada proposal is a separate matter, the public interest would be better served by having the Commission issue a First Report and Order allotting Channel 260A to Okolona with a window filing period and separately issue an Order to Show Cause to Station WZIX(FM), Artesia, to modify its channel for the benefit of Grenada.

7. We believe the public interest would be served by substituting Channel 261C2 for Channel 261A at Grenada, Mississippi, and Channel 260C2 for Channel 261A at Artesia, Mississippi, as well as modifying the licenses for Stations WQXB(FM) and WZIX(FM) to specify the higher class channels, since this will enable the Grenada and Artesia stations to expand their coverage areas. In addition, we believe the public interest would be served by allotting Channel 289A to Okolona, Mississippi, as that community's first local service. As noted above, the counterproposal for Channel 260A at Okolona is in conflict with the proposed substitution at Artesia. However, a staff study determined that Channel 289A instead of Channel 260A could be allotted to Okolona thus eliminating the need for a comparison of the communities or further action in this proceeding.[7]

8. Although we have not based our decision on a comparative analysis of the Grenada and Artesia upgrades versus the need for a first local service at Okolona, we note that there is a conflict between allotting Channel 289A at Okolona and protecting Station WWZQ(FM)'s application (File No. BPH-900516IB) for a construction permit for Channel 287C3 at Aberdeen, Mississippi. Under the policy set forth in *Andalusia, Alabama,* 49 FR 32201 (1984), a site preference specified in an application does not control over rule making proposals to allot new channels or upgrade existing channels unless there are overriding public interest reasons for favoring the application. As a result, we have conducted an analysis under allotment priority (4), other public interest matters, to determine if the application should be preferred.[8] In this regard, we compared the number of people that could receive service within the 60 dBu contour of Station WWZQ(FM), using maximum facilities on Channel 287C3, from the site specified in the application and the actual reference coordinates for the channel. We determined that 19,179 people could receive service from the application site while 21,020 could receive service from the reference coordinates for the channel. As a result, the application site would serve 1,841 fewer people than a transmitter site located at the actual reference coordinates for the channel.

9. Balanced against this fact, we next consider the public interest benefits flowing from grant of the allotment proposals in this proceeding. For this purpose, we will consider only the benefits from the upgrade proposals and not the new allotment at Okolona. This is because, absent an alternative channel to resolve the conflict between a new allotment at Okolona and the Grenada/Artesia upgrades, we would have preferred the first local service at Okolona over the expansion of secondary service to Grenada and Artesia. Thus, the allotment of Channel 289A at Okolona makes the Artesia and Grenada upgrades possible.

10. As Chatterbox has shown, the Artesia upgrade would provide service to an additional 96,131 people and the Grenada upgrade would provide service to an additional 92,889 people. Since these two upgrades would provide a combined gain of service to 189,020 individuals, we believe that it would better serve the public interest to grant these upgrades than to protect the Aberdeen application site which merely constitutes a site preference. Our view is further buttressed by the fact that the application site for the Aberdeen station would serve fewer people than a transmitter located at the reference coordinates for Channel 287C3 at Aberdeen.

11. Channel 261C2 can be allotted to Grenada, Mississippi, in compliance with the Commission's minimum distance separation requirements at the site specified by Chatterbox.[9] Channel 260C2 can be allotted to Artesia, Mississippi, in compliance with the minimum distance separation requirements at the site specified by WYS.[10] Channel 289A can be allotted to Okolona, Mississippi, in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.4 kilometers (2.7 miles) to avoid a short-spacing to Channel 287C3, Aberdeen, Mississippi, which was reserved for Station WWZQ in MM Docket No. 89-468.[11]

12. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1992,** the FM

---

[7] The reference coordinates used for Channel 289A at Okolona are 33-57-51 and 88-44-41. Although the Okolona restricted site, 4.4 kilometers south, is short-spaced to the site specified by Station WWZQ-FM, Aberdeen, MS, in its construction permit application (File No. 900516IB) for Channel 287C3, it meets the spacing requirement to the reference coordinates for Channel 287C3 at Aberdeen (33-50-20 and 88-18-30) as required by Section 73.208(a) of the Commission's Rules.

[8] Normally, we would not undertake an analysis on our own motion. Rather, we would expect the Aberdeen proponent to make a comparative showing. However, since we determined that Channel 289A was available to resolve the conflict between the mutually exclusive rulemaking proposals in this case and since we do not want to further delay this proceeding, we have done our own analysis.

[9] The coordinates for Channel 261C2 at Grenada are North Latitude 33-43-08 and West Longitude 90-01-56.

[10] The coordinates for Channel 260C2 at Artesia are North Latitude 33-41-00 and West Longitude 88-36-48.

[11] The reference coordinates for Channel 289A at Okolona are set forth in note 7 *supra*.

Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

| City | Channel No. |
|---|---|
| Artesia, Mississippi | 260C2 |
| Grenada, Mississippi | 261C2 |
| Okolona, Mississippi | 289A |

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WZIX(FM), Artesia, Mississippi, IS MODIFIED to specify operation on Channel 260C2 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WQXB(FM), Grenada, Mississippi, IS MODIFIED to specify operation on Channel 261C2 in lieu of Channel 261A, subject to the following conditions:

(a) With 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the Secretary SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the following:

Jim Buffington,
President
Tenn-Tom
Broadcasting Corp.
P.O. Box 1240
Aberdeen,
Mississippi 39730
(Licensee of
Station WWZQ(FM),
Channel 287C3,
Aberdeen, MS)

Frank R. Jazzo,
Esq.
Fletcher, Heald,
& Hildreth
1225 Connecticut
Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel to Bravo
Communications,
successor-in-interest
to WYS, Inc.)

16. The window period for filing applications for Channel 289A at Okolona, Mississippi, will open on **February 24, 1992,** and close on **March 25, 1992.**

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-179**

In the Matter of

Amendment of Section 73.202(b), RM-7734
Table of Allotments,
FM Broadcast Stations.
(Bixby, Oklahoma)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 30, 1991; Released: January 8, 1992**

By the Assistant Chief, Allocations Branch:

1. At the request of John M. Singer ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3662 (1991), proposing the substitution of Channel 287C3 for Channel 287A at Bixby, Oklahoma, and the modification of his construction permit for Station KBXT-FM to specify the higher class channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 287C3 for Channel 287A at Bixby since it could provide the community with a wide coverage area FM service and enable Station KBXT-FM to expand its service area. Channel 287C3 can be allotted to Bixby in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As proposed, and in accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KBXT-FM to specify operation on Channel 287C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Bixby, Oklahoma | 287C3 |

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of John M. Singer for Station KBXT-FM, Bixby, Oklahoma, IS MODIFIED to specify operation on Channel 287C3, in lieu of Channel 287A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, John M. Singer, permittee of Station KBXT-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 287C3 at Bixby are North Latitude 35-56-30 and West Longitude 95-52-48.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-563**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6078 |
| Table of Allotments, | RM-6710 |
| FM Broadcast Stations. | |
| (Dyersburg, Tennessee; | |
| De Witt, Heber Springs, | |
| Hoxie, Jonesboro, and | |
| Newport, Arkansas) | |

**SECOND REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 30, 1991; Released: January 7, 1992**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *First Report and Order*, 5 FCC Rcd 2579 (1990), which postponed a final disposition on a counterproposal filed by Newport Broadcasting Company ("Newport Broadcasting"), licensee of Stations KOKR(FM), Newport, Arkansas, and KAWW-FM, Heber Springs, Arkansas, proposing to substitute Channel 244C2 for Channel 288A[1] at Newport, and Channel 264C2 for 244A at Heber Springs, and the modification of the licenses of Stations KOKR(FM) and KAWW-FM, accordingly.[2] In the *First Report and Order*, the Commission found that because Newport Broadcasting's comments indicated that it would not reimburse Quadras, Inc., the licensee of Station KDEW-FM, De Witt, Arkansas, for a necessary channel change, it could not grant Newport Broadcasting's uncontested[3] counterproposals for the nonadjacent channels at Newport and Heber Springs. Because Quadras, Inc.'s subsequently filed petition for rule making requesting an upgrade would resolve the conflict posed by Station KDEW-FM, the Commission held in abeyance Newport Broadcasting's counterproposal to allot Channel 244C2 at Newport, and Channel 264C2 at Heber Springs until resolution of the separate De Witt proceeding. That proceeding having been resolved, *see De Witt and England, Arkansas*, 5 FCC Rcd 6735 (1990), and Newport Broadcasting having expressed a continuing intention to pursue the upgrades, we will now address Newport Broadcasting's proposed upgrades for Newport and Heber Springs.

2. We believe the public interest would be served by substituting Channel 244C2 for Channel 264A at Newport, Arkansas, and by substituting Channel 264C2 for Channel 244A at Heber Springs, Arkansas, as this will provide first wide coverage service to the communities, respectively. Channel 244C2 can be allotted at Newport with a site restriction of 17.3 kilometers (10.7 miles) southwest in order to avoid a short-spacing to Station KAHR(FM) (formerly KXOQ(FM). Channel 244A, Poplar Bluff, Missouri.[4] We note that this allotment is short-spaced to Station KDEW-FM, De Witt, Arkansas, at its licensed facility on Channel 244A, at coordinates 34-16-09 and 91-21-02, and thus is dependent on Station KDEW-FM's relocating to Channel 247C2 pursuant to the directive set forth in the *Report and Order* in MM Docket No. 90-335 in order to meet the Commission's minimum distance separation requirements. We also note that the Newport allotment meets the minimum distance separation requirements with respect to the site specified in the application (File No. BPH-910722IB) for construction permit filed by Station KDEW-FM's licensee, Quadras, Inc. Therefore, the issuance of a license for the Newport facility will be withheld until the license grant occurs at De Witt. The allotment of Channel 264C2 to Heber Springs requires a site restriction of 6.2 kilometers (4.2 miles) south of the city in order to avoid a short spacing to Station KFCM(FM), Channel 265A, Cherokee, Arkansas.[5] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein Newport Broadcasting's licenses for Station KOKR(FM), Channel 264A, Newport, Arkansas, to specify operation on Channel 244C2, and Station KAWW-FM, Channel 244A, Heber Springs, Arkansas, to specify operation on Channel 264C2.[6]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1992,** the FM

---

[1] The *First Report and Order* substituted Channel 264A for Channel 288A at Newport.

[2] After considering the six options presented in the *Further Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 4814(1989), the *First Report and Order* allotted Channel 261C2 at Dyersburg, Tennessee, at the request of Dr Pepper Pepsi-Cola Bottling Company of Dyersburg, Inc. Channel changes at Hoxie, Arkansas (Channel 287A for Channel 263A), Newport, Arkansas (Channel 264A for Channel 288A) and Jonesboro, Arkansas (Channel 262A for Channel 261A) were granted in order to accomplish that upgrade. As stated, action on Newport Broadcasting's Newport and Heber Springs counterproposals was deferred.

[3] As noted in the *First Report and Order*, no party filed a timely expression of interest in the nonadjacent channels for Newport and Heber Springs. Further, the Commission dismissed as procedurally defective counterproposals filed by Mountain Home Radio Station and Pauline Rose. *See* 5 FCC Rcd at 2581.

[4] The restricted site coordinates for Channel 244C2 at Newport are 35-29-00 and 91-22-30. We note that the allotment meets the required minimum distance separation to Station KXOZ, Channel 245C2, Mountain View, Missouri, at coordinates 36-59-29 and 91-47-41, based upon the provisions of Section 73.208 of the Commission's Rules.

[5] The restricted site coordinates for Channel 264C2 at Heber Springs are 35-25-52 and 92-01-54.

[6] Because these allotments are made as a result of a petition for rule making filed prior to October 2, 1989, the licensee of Station KOKR, Newport, Arkansas, may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station KAHR, Channel 244A, Popular Bluff, Missouri. Likewise, the licensee of Station KAWW-FM, Heber Springs, Arkansas, may avail itself of the provisions of Section 73.213(c) with respect to Station KCJC(FM), Channel 265A, Russellville, Arkansas, and Station KFCM(FM), Channel 265A, Cherokee, Arkansas. *See* 47 C.F.R. Section 73.213(c).

Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

| City | Channel No. |
|---|---|
| Newport, Arkansas | 244C2 |
| Heber Springs, Arkansas | 264C2 |

4. IT IS FURTHER ORDERED, That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of Newport Broadcasting Co. for Station KOKR(FM), Channel 264A, Newport, Arkansas, and Station KAWW-FM, Channel 244A, Heber Springs, Arkansas, ARE MODIFIED to specify operation on Channel 244C2 and Channel 264C2, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission applications for construction permits (Form 301), specifying the new facilities;

(b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: January 7, 1992**

## MOBILE MARINE RADIO FILES FURTHER COMMENTS REGARDING ITS PETITION FOR DETERMINATION OF NON-DOMINANT STATUS

**PUBLIC COMMENT INVITED**

Mobile Marine Radio, Inc. (MMR) has filed further comments regarding its Petition for Determination of Non-Dominant Common Carrier Status, filed February, 1988, File No. DF-88.001-DS. We placed MMR's Petition on public notice, DA-88-897, on May 8, 1988. MMR requested in its Petition that the Commission formally declare public coast maritime mobile radio service providers to be non-dominant in their provision of such service.

In its further comments, MMR urges the Commission to differentiate among public coast maritime providers and find those carriers who offer both point-to-point and maritime telex services to be dominant carriers in the maritime market and those who render only maritime service to be non-dominant. Alternatively, MMR requests the Commission to require dual authority telex carriers to operate their point-to-point and their maritime services on fully separated bases, in order to eliminate allegedly anticompetitive tying arrangements between their maritime service and their point-to-point service.

Parties may file comments in response to MMR's further comments no later than **February 10, 1992.** Replies should be filed no later than **February 25, 1992.** Comments should reference File No. DF-88.001-DS. Parties should file copies of their comments and replies with the Secretary, FCC, and additionally send one copy of each pleading to Ms. Jennifer Warren, International Facilities Division, Common Carrier Bureau, 1919 M Street, N.W., Room 534, Washington, D.C. 20554 and to Downtown Copy Center (DDC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the International Facilities Division public reference room, 1919 M Street, N.W., Room 533, Washington, D.C. Copies are also available from DCC.

For further information contact Jennifer Warren or Susan Lee O'Connell at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

PCI COMMUNICATIONS, INC. File No. I-T-C-91-171

Application for authority to operate
as an international resale carrier.

MICRO BUSINESS SYSTEMS, INC. File No. I-T-C-91-174

Application for authority to operate
as an international resale carrier.

ASIAN AMERICAN TELECOM File No. I-T-C-91-189

Application for authority to operate
as an international resale carrier.

**MEMORANDUM OPINION, ORDER AND CERTIFICATE**

**Adopted: December 24, 1991; Released: January 7, 1992**

By the Chief, International Facilities Division:

1. The above captioned applications request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched services between the U.S. mainland, Guam and various overseas points. We placed File Nos. ITC-91-171 and ITC-91-174 on public notice on July 24, 1991. File No. ITC-91-189 was placed on public notice on August 14, 1991. Comments on the applications of PCI Communications, Inc. ("PCI") and Asian American Telecom ("AAT") were filed by US Sprint Communications Company, Ltd. ("Sprint").[1] IT&E Overseas, Inc. ("IT&E") filed a Petition to Deny[2] PCI's application.

2. Micro Business Systems, Inc. ("MBS") and AAT are non-dominant start-up companies which propose to provide international switched voice, data and facsimile services in competition with other common carriers already providing such services. In its application, MBS states that it intends to lease lines between Guam and the contiguous U.S. ("CONUS") from MCI or IT&E and resell switched voice services of MCI, AT&T and/or Sprint from CONUS to international points covered by the international carriers' tariffs. AAT states that it wishes to lease capacity between Guam and Hawaii from Comsat, or use fiber optic bearer facilities leased from PCI and/or World Communications, Inc. ("Worldcom") to link Guam and Hawaii, and resell Sprint's WATS and "800" service from Hawaii to international points covered by that tariff.[3]

3. PCI is a non-dominant carrier currently offering domestic packet-switched data services between Guam, the Northern Marianas, Hawaii and CONUS. PCI now proposes to provide international switched voice, data and facsimile services in competition with other common carriers already providing such services. It intends to offer international services by leasing capacity from Worldcom between Guam and CONUS, and reselling the international switched voice service of Sprint and Execuline of Sacramento.[4]

4. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[5] Accordingly, we have consistently authorized applicants to provide international resale of switched services in competition with established carriers and other resellers.[6] We find here that the market will support additional carriers and that the added competition will be in the public interest.[7]

5. Sprint argues in File Nos. ITC-91-171 and ITC-91-189 that we should delay granting resale authority until the Commission issues an order in DA-90-1198. In DA-90-1198 IT&E has alleged that division of revenue contracts allegedly forced on it by Guam Telephone Authority ("GTA"), a public corporation created and owned by the Government of Guam, discriminate against IT&E in favor of RCA Globcom (the dominant international carrier on Guam), contravene FCC access charge rules and conflict with FCC equal access policies. IT&E has also challenged a law promulgated by the Guam legislature requiring the Guam Public Utilities Commission ("PUC") to regulate interstate access services on Guam and requiring the GTA to file interstate access tariffs with the PUC. IT&E has requested a declaratory ruling that the law is unlawful, that the FCC has exclusive jurisdiction over interstate access and rates, and that the agreement between GTA and IT&E is unlawful and unenforceable.

6. Sprint believes that the issue of Guam's status as either a domestic or international entity, and whether or not the Commission has jurisdiction over it, is one that directly affects these applications. Implicit in Sprint's argument is the notion that Guam's status remains in doubt. If Guam is an international point, then "international" settlement arrangements between RCA Globcom and a U.S. overseas carrier, such as Sprint, would be undermined by entities which attempt to lease private lines between Guam and CONUS. Sprint argues against granting the authority because both PCI and AAT intend to lease lines between Guam and the U.S. mainland, whereas Sprint and RCA Globcom have a settlement agreement, similar to traditional international correspondent arrangements, to provide service between the two points. The lease of private lines by PCI and AAT, Sprint argues, would amount to international resale of private lines, if Guam is considered an international point, and would undermine the accounting rates arrangement between the two companies.

7. IT&E argues that Sprint mischaracterizes both the proceeding in DA-90-1198 and the arrangement between RCA Globcom and Sprint. Asserting that the proceeding concerns only the question of equal access and discriminatory local exchange carrier rates, IT&E denies that the domestic or international character of Guam is in issue. IT&E also notes that the relationship between Sprint and RCA Globcom is a voluntary agreement, as opposed to an international correspondent arrangement. PCI contends that its proposed service is lawful under current FCC practice, that it can perceive no nexus between DA-90-1198 and its application, and that it would be willing

to make any modifications to its service, along with similarly situated carriers, if the proceeding in DA-90-1198 were to affect PCI's service offering.

8. We agree with both IT&E and AAT that the domestic status of Guam for interexchange communications has been long-settled.[8] Further, we believe that Sprint misjudges the relevance of DA-90-1198 to these applications. The proceeding in DA-90-1198 concerns the issue of what jurisdiction over Guam entails, and not the broad issue, already settled, regarding whether Guam is a domestic or international point. Whether or not the Commission has jurisdiction over the GTA has no ascertainable relation to the "domestic" or "international" character of the revenue-sharing agreement between Sprint and RCA Globcom for service to and from Guam. And since international resale of private lines can only occur between international points, we find no occasion to be concerned over the possible effect of private line domestic resale on the Sprint-RCA Globcom arrangement. As stated above, we believe that the international resale of international switched service is in the public interest, and we find no reason to delay the grant of applications that would increase competition in the provision of international telecommunications service to and from Guam.

9. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched services to the general public by PCI, MBS and AAT by the resale of the switched voice services of other carriers.

10. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-171, I-T-C-91-174 and I-T-C-91-189 ARE GRANTED; and

a. PCI is authorized to:

1. lease from Worldcom and operate private line facilities between Guam and the contiguous U.S. for provision of international switched voice, data and facsimile service through interconnection with the switched voice services of Worldcom, Sprint and Execuline of Sacramento; and

2. provide international switched voice, data and facsimile services by the resale of the international switched voice services set forth in Worldcom's Tariff F.C.C. No. 1, Sprint's Tariff F.C.C. Nos. 1 and 2 and Execuline of Sacramento's Tariff F.C.C. No. 1, between the contiguous U.S. and Guam, on the one hand, and international points listed in those tariffs, on the other hand.

b. MBS is authorized to:

1. lease from MCI or IT&E and operate one 56 kbps circuit in the TPC-3 cable between Guam and the U.S. mainland, for provision of international switched voice, data and facsimile service through interconnection with the switched voice services of MCI, Sprint and AT&T; and

2. provide international switched voice, data and facsimile service by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2 and AT&T's Tariff F.C.C. Nos. 1 and 2, between the contiguous U.S. and Guam, on the one hand, and the international points listed in those tariffs, on the other hand.

c. AAT is authorized to:

1. lease from Worldcom, PCI and/or Comsat and operate facilities between Guam and Hawaii for the provision of international switched voice and data service through interconnection with the switched voice services of Sprint; and

2. provide international switched voice and data service by the resale of the international switched voice services set forth in Sprint's Tariff F.C.C. No. 2, between Guam and international points listed in those tariffs.

11. IT IS FURTHER ORDERED that copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

12. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

13. IT IS FURTHER ORDERED that applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 74 C.F.R. section 43.61.

14. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] IT&E Overseas, Inc. ("IT&E") also filed Comments on AAT's application, as well as a Response to Sprint's Comments thereon. Both AAT and PCI filed Oppositions to the Comments of Sprint on their respective applications.

Commenting on AAT's application, IT&E stated that AAT did not indicate whether it was foreign-owned or controlled and failed to file separate applications for IMTS and non-IMTS services. We note simply that we will accept AAT's statement, in its Opposition to IT&E's Comments, that it is not a foreign-owned or controlled carrier. Furthermore, AAT no longer proposes to offer non-IMTS service, thus obviating IT&E's second concern.

[2] Filed on August 23, 1991, IT&E's Petition to Deny was withdrawn on November 18, 1991. The Petition alleged that PCI offered international service without Section 214 authorization for a time prior to and during the period of the PCI's application. IT&E also alleged that PCI violated the International Competitive Carrier decision by submitting requests for IMTS and non-IMTS service in the same application. *See In re the Matter of International Competitive Carrier Policies* ("*International Competitive Carrier*"), 102 FCC 2d 812, 845 (1985). IT&E also filed a formal complaint against PCI, which was subsequently withdrawn. *See* Order released Dec. 5, 1991, DA-91-1492, File No. E-91-107 (Com.Car.Bur. 1991).

[3] AAT originally proposed to provide service between Guam and international points directly, pursuant to COMSAT's Tariff FCC No. 103, as well as service pursuant to COMSAT's Tariffs FCC Nos. 102 and 104. In addition, AAT had requested authority to provide international video conferencing services. In response to a staff inquiry, AAT filed a letter clarifying that it was no longer requesting such authority in its present application.

[4] PCI originally sought authorization to resell international packet data service. In response to a staff inquiry, however, PCI withdrew its request. Additionally, PCI clarified in a separate letter that it intended to lease a fiber optic facility from World Communications, Inc., in order to provide the Guam-U.S. link for its proposed international service.

[5] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[6] *See, e.g., International Telecom, Inc.*, 6 FCC Rcd 1964 (Int'l Fac. Div. 1991); *Argo Communications International, Inc.*, 1 FCC Rcd 578 (Com.Car.Bur. 1986).

[7] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio & Telegraph Co.*, 28 FCC 231 (1960).

[8] *See* 47 U.S.C. section 153(e), (f), (g); *Application of General Electric Co., GE Subsidiary, Inc. 21, and MCI Communications Corporation for Authority to Transfer Control of RCA Global Communications, Inc.*, 3 FCC Rcd 2803 at 2806-07; *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorization Therefor, Third Report and Order*, Mimeo No. 012, released Oct. 6, 1983, 48 Fed. Reg. 46,791 (Oct. 15, 1983), paras. 2-4. *See also, International Common Carrier*, 102 FCC 2d at 832.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-327**

In the Matter of

Conquest Telecommunications, Inc.

**ORDER**
**Proceeding Terminated**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 20, 1991, Conquest Telecommunications, Inc. (Conquest) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, Conquest states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, Conquest stated that its total charge for the same call under the rates then in effect would be $8.71. This represents a reduction of more than 24 percent from the highest total charge Conquest reported in its June 21 report. It was on the basis of that report and the rates Conquest then had in effect that we found that Conquest's rates appeared to be unjust and unreasonable. Conquest no longer charges the rates that prompted this proceeding. Conquest therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-327 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that Conquest's rates are just and reasonable.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

Carl D. Lawson
Deputy Bureau Chief (Policy)
Common Carrier Bureau

**CC Docket No. 91-329**

In the Matter of

Com Systems, Inc.

**ORDER**
**Proceeding Terminated**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 20, 1991, Com Systems, Inc. (CSI) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, CSI states that its total charge for a sample eight-minute call would be $6.54. In a report filed June 21, 1991, CSI stated that its total charge for the same call under the rates then in effect would be $8.09. This represents a reduction of approximately 19 percent from the highest total charge CSI reported in its June 21 report. It was on the basis of that report and the rates CSI then had in effect that we found that CSI's rates appeared to be unjust and unreasonable. CSI no longer charges the rates that prompted this proceeding. CSI therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-329 IS TERMINATED.

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that CSI's rates are just and reasonable.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

**CC Docket No. 91-332**

In the Matter of

South Texas Phone, Inc.

**ORDER**
**Proceeding Terminated**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 12, 1991, South Texas Phone, Inc. (STP) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, STP states that its total charge for a sample eight-minute call would be $6.48. In a report filed June 21, 1991, STP stated that its total charge for the same call under the rates then in effect would be $7.95. This represents a reduction of more than 18 percent from the highest total charge STP reported in its June 21 report. It was on the basis of that report and the rates STP then had in effect that we found that STP's rates appeared to be unjust and unreasonable. STP no longer charges the rates that prompted this proceeding. STP therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-332 IS TERMINATED.

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that STP's rates are just and reasonable.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

**CC Docket No. 91-333**

In the Matter of

TelTrust, Inc.

**ORDER**
**Proceeding Terminated**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 13, 1991, TelTrust, Inc. (TelTrust) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, TelTrust states that its total charge for a sample eight-minute call would be $6.06. In a report filed June 21, 1991, TelTrust stated that its total charge for the same call under the rates then in effect would be $7.81. This represents a reduction of more than 22 percent from the highest total charge TelTrust reported in its June 21 report. It was on the basis of that report and the rates TelTrust then had in effect that we found that TelTrust's rates appeared to be unjust and unreasonable. TelTrust no longer charges the rates that prompted this proceeding. TelTrust therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-333 IS TERMINATED.

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that TelTrust's rates are just and reasonable.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-334**

In the Matter of

U.S. Fiberline Communications

**ORDER**
**Proceeding Terminated**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 18, 1991, U.S. Fiberline Communications (U.S. Fiberline) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, U.S. Fiberline states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, U.S. Fiberline stated that its total charge for the same call under the rates then in effect would be $9.81. This represents a reduction of almost 33 percent from the highest total charge U.S. Fiberline reported in its June 21 report. It was on the basis of that report and the rates U.S. Fiberline then had in effect that we found that U.S. Fiberline's rates appeared to be unjust and unreasonable. U.S. Fiberline no longer charges the rates that prompted this proceeding. U.S. Fiberline therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-334 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that U.S. Fiberline's rates are just and reasonable.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3401 and 3598

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3401 to modify Virtual Telecommunications Network Service (VTNS) Option 12. VTNS modified Option 12: reduces the Basic Charge; reduces the Minimum Annual Charge; clarifies the application of certain credits; and introduces a Domestic Data Transmission Capability Volume Pricing Plan. AT&T Transmittal No. 3401 Description and Justification (D&J) at 2-5. Transmittal 3401 is scheduled to take effect on December 24, 1991. On November 1, 1991, AT&T filed Transmittal No. 3598 to modify revisions in Transmittal 3401 by reducing the Basic Charge for a two month period to conform pending revisions to AT&T's agreement with the initial VTNS customer.

2. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate Transmittal 3401 on September 9, 1991. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3401, and US Sprint Communications Company Limited Partnership (Sprint), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal 3401 on September 10, 1991. AT&T filed a reply on September 19, 1991. MCI filed a petition to reject Transmittal 3598 on November 6, 1991; AT&T replied to that petition on November 12, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 12.[2] In that Order, the Commission prohibited the bundling of inbound service in Tariff 12 Options but exempted existing options from the prohibition. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 12, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 28 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. Williams argues that AT&T has failed to demonstrate that modified Option 36 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 12 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

5. AT&T replies that this filing makes no fundamental change to Option 12; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3401 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 12 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

6. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 12 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

7. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3401, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 12, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

9. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 3401 and 3598, ARE REJECTED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3401, filed by MCI Telecommunications Corporation, the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3401, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, and the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12 Transmittal No. 3598, filed by MCI Telecommunications Corporation, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1155 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than 5 business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

---

[4] *See Interexchange Order, supra,* note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

**CC Docket No. 91-335**

In the Matter of

U.S. Long Distance, Inc.

**ORDER**
**Proceeding Terminated**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 20, 1991, U.S. Long Distance, Inc. (USLD) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, USLD states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, USLD stated that its total charge for the same call under the rates then in effect would be $7.54. This represents a reduction of approximately 13 percent from the highest total charge USLD reported in its June 21 report. It was on the basis of that report and the rates USLD then had in effect that we found that USLD's rates appeared to be unjust and unreasonable. USLD no longer charges the rates that prompted this proceeding. USLD therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request. [2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-335 IS TERMINATED.

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that USLD's rates are just and reasonable.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

SEG CELLULAR LIMITED PARTNERSHIP — File No. 163500-91-26-MHK

For unauthorized construction of two new cells for Station KNKN586 in the Domestic Public Cellular Radio Telecommunications Service serving Market 102A, Des Moines, Iowa.

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: December 24, 1991; Released: January 8, 1992**

By the Commission:

1. On April 25, 1990, SEG Cellular Limited Partnership (SEG) filed an FCC Form 401 (File No. 05453-CL-MP-91) proposing the construction of two new cell sites located at Indianola and Dallas, Iowa for its authorized station KNKN586 serving the Des Moines, Iowa MSA. In order to receive construction authority, an FAA determination is required for each tower and the Antenna Survey Branch (ASB) of the Field Operation Bureau must clear the tower.[1] ASB cleared the Indianola cell site and provided the lighting and marking requirements. ASB did not clear the Dallas cell site because the required FAA determination was not provided by SEG. Accordingly, the Mobile Services Division (MSD) requested SEG to provide a copy of the final FAA determination for the Dallas site.[2] SEG, however, did not respond to the request and, therefore, the application to construct and operate the two new cell sites was not granted. On November 13, 1990, SEG filed FCC Form 489 (File No. 07231-CL-L-91) notifying the Commission of the completion of its construction of the Indianola cell site and a new cell site at Panther, Iowa, that had not been previously requested.[3] On August 5, 1991, SEG filed a request for Special Temporary Authority to continue cellular operations and on August 7, 1991, an amendment to its application correcting the unauthorized construction. Because the construction of the Panther site was a major modification to SEG's existing facilities, an FCC Form 401 requesting prior Commission authority was required. A notification on FCC Form 489 was, therefore, in violation of the rules. SEG thus had constructed and placed into operation, without Commission authority, the proposed Indianola cell site and a new cell site at Panther, Iowa.[4]

2. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Because SEG had not received authority to construct the cell sites proposed under File No. 05453-CL-MP-91, it is determined that an apparent violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules has occurred for constructing facilities at unauthorized locations.

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that SEG's construction of the facilities as of January 8, 1991 constitutes willful and repeated conduct within the terms of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), the base forfeiture amount for constructing at an unauthorized location is $40,000. Consistent with this *Policy Statement*, we are adjusting upward the amount to $80,000 because SEG repeated the violation by constructing two unauthorized cells.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, IT IS ORDERED that SEG Cellular Limited Partnership be advised of an APPARENT LIABILITY FOR FORFEITURE of Eighty Thousand Dollars ($80,000) for willful and repeated violations of the aforementioned statutory and rule provisions.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, Post Office Box 73481, Chicago, IL 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] Applicants can request marking and lighting instructions for preconstruction of their towers pursuant to Section 22.43(d) of the Commission's rules. SEG made no such request. .

[2] *See* letter from the Chief, Mobile Services Division, to Richard L. Vega (Aug. 20, 1990) requesting FAA determination for SEG's Dallas cell site. A copy of this letter was also sent to SEG on the same date.

[3] The MSD staff had not discovered the unauthorized construction and inadvertently issued an authorization on January 8, 1991. The MSD subsequently discovered the unauthorized construction and notified SEG.

[4] The Panther site has been cleared by the ASB and marking and lighting instructions have been provided.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

McCaw RCC Communications, Inc. File No. 63500-91-25-RPS

Notice of Apparent Liability for Forfeiture Penalty for Station KAA276 in the Public Land Mobile Radio Service at Colorado Springs, CO

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: December 24, 1991; Released: January 8, 1992**

By the Commission:

1. On July 9, 1987, the Commission granted Interlink Communications of Colorado (Interlink) authority to construct and operate control facilities for Station KAA276 on frequency 72.30 MHz at 11 Transmitter Lane, Colorado Springs, CO. On May 24, 1988 Interlink filed FCC Form 489 notifying the Commission that construction was completed. On May 27, 1989, the Commission granted a renewal of the license. On August 11, 1989, after receiving Commission approval, Station KAA276 was transferred from Interlink to McCaw RCC Communications Inc. (McCaw). On May 21, 1991, the Commission received from McCaw: (1) a request for Special Temporary Authority to continue to operate its 72.30 MHz facility of Station KAA276 at a location described as Cheyenne Mountain 6.6 miles SSW of Colorado Springs, CO, pending Commission action on an application to relocate the facility from 11 Transmitter Lane, Colorado Springs, to the Cheyenne Mountain location at which it is currently operating, and (2) an application to relocate the 72.30 MHz facility from 11 Transmitter Lane, Colorado Springs, CO, to Cheyenne Mountain, 6.6 miles SSW of Colorado Springs, CO.

2. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Any service to the public that was provided from the location of Station KAA276, at Cheyenne Mountain 6.6 miles SSW of Colorado Springs, CO from the date McCaw acquired control, August 11, 1989, and May 21, 1991, the receipt date of the STA request and the application to relocate was, therefore, unauthorized and in violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules. Consequently, it is determined that an apparent violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules has occurred for operating a facility at an unauthorized location after that date.

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that the McCaw operation of the facility until May 21, 1991, constitutes willful and repeated conduct within the terms of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), the base forfeiture amount for operating at an unauthorized location is $40,000. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture to $28,000 because McCaw voluntarily disclosed its unauthorized operation to the Commission.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b) and Section 1.80 of the Commission's rules 47 C.F.R. Sec. 1.80, IT IS ORDERED that McCaw RCC Communications Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Twenty Eight Thousand Thousand Dollars ($28,000.00) for willful and repeated violations of the aforementioned statutory and rule provisions until May 21, 1991.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

McCaw RCC Communications, Inc. File No. 63500-91-30-RPS

Notice of Apparent Liability for Forfeiture Penalty for Station KWU329 in the Public Land Mobile Radio Service at Colorado Springs, Colorado

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: December 24, 1991; Released: January 8, 1992**

By the Commission:

1. On June 21, 1983, the Commission granted authority to Radio Contact Corporation to construct and operate facilities for Station KWU329 on frequency 931.5875 MHz at Cheyenne Mountain, 8 miles SSW of Colorado Springs, Colorado. The expiration date of the license was April 1, 1984. The expiration date was subsequently extended five years to April 1, 1989. On September 7, 1989, the Commission was notified of the consummation of a transfer of the facilities of Station KWU329 from Interlink Communications of Colorado to McCaw RCC Communications Inc. (McCaw). On May 21, 1991, the Commission received from McCaw: (1) a request for Special Temporary Authority (STA) to continue to operate the 931.5875 MHz facilities licensed under call sign KWU329 from a location described as 6.6 miles SSW of Colorado Springs, Colorado, pending Commission action on an application to relocate the facility from Cheyenne Mountain 8 miles SSW of Colorado Springs, Colorado,[1] to the location at which it is currently being operated, and (2) an application to relocate the facilities.

2. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's rules states:

> No Person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Any services to the public that was provided from the location of Station KWU329, 6.6 miles SSW of Colorado Springs, Colorado, between the date of transfer September 7, 1989 and May 21, 1991 the receipt date of the STA request was, therefore, unauthorized and in violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules. Consequently, it is determined that an apparent violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules has occurred for operating a facility in an unauthorized manner after that date.

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or if any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that McCaw RCC Communications, Inc. operation of the facility continuing until May 21, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), the base forfeiture amount for operating at an unauthorized location is $40,000. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture to $28,000 because McCaw voluntarily disclosed its unauthorized operation to the Commission.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b) and Section 1.80 of the Commission's rules 47 C.F.R. Sec. 1.80, IT IS ORDERED that McCaw RCC Communications Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Twenty Eight Thousand Dollars ($28,000) for willful and repeated violations of the aforementioned statutory and rule provisions continuing until May 21, 1991.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTE**

[1] A review of the Commission's files indicates that no application had ever been received to relocate the 931.5875 MHz facility from the Cheyenne Mountain location, 8 miles SSW of Colorado Springs, Colorado.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-183**

In re Applications of

| | |
|---|---|
| WOODS COMMUNICATIONS GROUP, INC. | File No. BPCT-870904KJ |
| PEARS BROADCASTING, INC. | File No. BPCT-871109KF |
| GILES TELEVISION, INC. | File No. BPCT-871110KE |
| CALDWELL BROADCASTING LIMITED PARTNERSHIP | File No. BPCT-871110KH |
| KTVE, INC. | File No. BPCT-871110KL |

For Construction Permit for
New Television Station,
Channel 11,
Columbia, Louisiana

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 24, 1991; Released: January 9, 1992**

By the Commission:

1. We have before us applications for review of the Review Board's Decision in this case, 6 FCC Rcd 3529 (Rev. Bd. 1991).[1] In light of the arguments raised in these pleadings and our review of the evidence and the lower decisions, we hold that a different outcome is warranted than that ordered by the Board. Nonetheless, we agree with the Board's conclusions except as otherwise indicated.

2. The ALJ selected Pears as the best-qualified applicant because he determined that only Pears deserves 100 percent quantitative integration credit and because he concluded that Pears is not to be charged with a diversification demerit. As for the other applicants, the ALJ found that Caldwell deserves no integration credit because its integration proposal is not reliable; that Woodscom deserves no integration credit because its principal's integration commitment is merely temporary and that it must be charged with a substantial diversification demerit; that Giles TV is also to be charged with a diversification demerit and deserves only 40 percent integration credit in view of inappropriate involvement by its nominally passive owner; and that no applicant deserves a preference for superior coverage or past performance. 5 FCC Rcd 5859 (ALJ 1990).

3. After considering exceptions filed by Caldwell, Woodscom, and Giles TV, the Review Board concluded that Caldwell, rather than Pears, ought to prevail. The Board held that Caldwell's integration proposal is credible and that its multiple qualitative integration enhancements outweigh Pears'. As it also held that Caldwell's several integration enhancements outweigh the minority enhancement claimed by Giles TV, the Board saw no need to decide whether Giles TV deserves full quantitative integration credit. The Board held that Woodscom could not win because its integration enhancement showing is inferior, because it is charged with a substantial diversification demerit, and because it has no significant preference to offset these deficiencies. 6 FCC Rcd 3529, 3529-30 ¶ 4, 3533 n.3, n.5 (Rev. Bd. 1991).

4. Pears, Giles TV, and Woodscom contend that the Board erred in concluding that Caldwell deserves full credit for integration, and Giles TV and Woodscom also argue that the Board erred by denying or dismissing the claims for preferences and quantitative integration credit that they had raised in exceptions. Caldwell, Pears, Giles TV, and Woodscom each maintains that it deserves to prevail in the final comparative assessment. We hold, for the reasons stated below, that Pears is the best-qualified applicant.

**DISCUSSION**

**A. Pears**

5. As noted, Pears received full quantitative integration credit in the Initial Decision and no diversification demerit. No one has challenged the award of integration credit. One competing applicant, Giles TV, contends in its application for review that Pears should be charged with a diversification demerit because of the interests of one of its principals, but the contention is unpersuasive, as Giles TV advances no reason for reversing the ALJ's conclusion that the principal in question made timely commitments to divest his existing media interests. 5 FCC Rcd at 5860-61 ¶¶ 13, 18-21. We therefore concur in the conclusions that Pears deserves full quantitative integration credit and that it is not to be charged with a diversification demerit. These conclusions are of dispositive significance when considered in light of the determinations that we reach in the following discussion regarding the comparative qualifications of the other competing applicants.

**B. Woodscom**

6. *Claim of Special Preference for Performance as a Broadcast Licensee*: Woodscom complains of the fact that the ALJ refused to admit into evidence a document that Woodscom designated as Exhibit 1B, concerning certain of its activities as the licensee of UHF television Station KARD-TV, Channel 14, West Monroe, Louisiana. The ALJ rejected Exhibit 1B because Woodscom had not previously moved for the addition of a hearing issue regarding its performance as the licensee of KARD-TV and had not made a threshold showing that its broadcast record was superior. Tr. 342. Woodscom had argued that the exhibit was admissible in the absence of a threshhold showing or enlargement of hearing issues because the

Commission had assertedly indicated in *Amendment of Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 63 FCC 2d 840, 892 (1977), that it would give special consideration to past performance by the licensee of a UHF station in a market where a VHF channel had recently been assigned when making a comparative evaluation of an application by the UHF licensee for a permit to operate on the "dropped-in" VHF channel coupled with a contingent pledge to divest itself of the UHF station. Woodscom also cited *Knoxville Broadcasting Corp.*, 103 FCC 2d 669 (Rev. Bd. 1986), a case entailing comparative evaluation of such an application for a dropped-in VHF channel, in which the Review Board, citing *Top 100 Markets*, reviewed findings based on evidence of the UHF licensee's past performance that had been received in the absence of a motion for addition of a special hearing issue and awarded a decisive preference in light of those findings. The Board agreed with the ALJ that *Top 100 Markets* and *Knoxville* are inapposite, however. 6 FCC Rcd at 3533 n.5.

7. Woodscom still insists that *Top 100 Markets* and *Knoxville* are controlling. We agree with the Board and the ALJ, however, for the reasons given in their decisions, that Woodscom is not entitled to special consideration merely because of its status as the licensee of KARD-TV, and we therefore reject its contention that the exclusion of Exhibit 1B was in error.

8. In any case, even if we agreed with Woodscom that the ALJ should have accepted Exhibit 1B, we would not hold that his exclusion of it was reversible error, as it does not appear that the exhibit, taken at face value, is of material importance.[2] The exhibit contains no information as to the nature of the programming that Woodscom broadcast over KARD-TV or other information from which to judge the extent to which the station responded to local needs and interests. It merely asserts that Woodscom filed an application for authority to change its transmitter and antenna site; that it later abandoned the application after learning that it was contrary to the Commission's rules for antenna spacing; that it filed a second application to change sites, which was granted; and that it subsequently took various measures, as required by FCC rules, to eliminate interference with land-mobile communications. Woodscom cites no pertinent authority and presents no reasoned argument for the proposition that a showing such as this would warrant the award of a comparative preference, and we are aware of no precedent or public-interest consideration that supports its position. The Commission did not say or imply in *Top 100 Markets*, nor did the Review Board hold in *Knoxville*, that credit would be given for past performance in the absence of any evidence concerning the licensee's programming service. As admission of this non-probative exhibit would not have helped Woodscom's case, the exclusion of it was, at worst, harmless error.

9. *Claim of Credit for Integration*: According to undisputed findings, Woodscom's only principal, Charles Woods, proposes to work at the new station for twenty to forty hours per week for an initial period of one year, after which he would devote a lesser, unspecified amount of time to managing the station. He plans to remain domiciled in Nevada but testified that he would lease an apartment in Columbia for use on occasions when he found it necessary to spend time at the station. 5 FCC Rcd at 5862 ¶¶ 26-27. The ALJ held that, because of the uncertainty of Woods' testimony as to the manner in which he plans to supervise station operation after the initial period and as to the amount of time that he would devote to that function, Woodscom deserves no credit for integration. *Id.* at 5862 ¶ 26, 5868 ¶ 87. The Review Board sustained that ruling, noting that in the *Policy Statement on Comparative Broadcast Hearings* the Commission stressed the importance of permanent adherence to integration proposals. 5 FCC Rcd at 3533 n.5; 1 FCC 2d 393 at 395 n.6 (1965).

10. Woodscom contends that the refusal to credit its integration proposal is at odds with *Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988), where the Commission gave credit for a principal's part-time integration commitment even though he proposed to work at the station for only three days a week, in contrast to previous holdings that integration credit was not to be given for commitments to be present for less than five days per week. *Id.* at 733 ¶ 23. Woodscom contends that Mr. Woods has proven by his "unquestionable" success and dedication in supervising the operation of KARD-TV and three other full power television stations licensed to Woodscom that he is able to manage broadcast stations effectively without daily physical presence at their studios. Hence, Woodscom maintains that it is entitled to integration credit despite the fact that Mr. Woods has not proposed to be physically present at the station on a regular basis after the first year.

11. The Commission did not hold in *TV 15*, or in any other precedent of which we are aware, that integration credit may be awarded for proposed involvement for unspecified amounts of time at unspecified intervals. On the contrary, as *TV 15* recognizes, *id.* at 733 ¶ 26, the Commission has declined to grant even partial credit unless involvement is proposed for at least twenty hours per week. We have not been shown any reason to depart from that rule, the rationale for which was well-explained in *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494-95 (Rev. Bd. 1979), rev. denied, FCC 79-397 (rel. 6-21-79). Woodscom therefore deserves no credit for its principal's vague proposal to devote unspecified amounts of time to supervision of the new station after an initial period of involvement. As for Mr. Woods' commitment to spend "twenty to forty" hours per week at the station for one year, it merits no more credit than would be due for a twenty-hour-per-week commitment for the same period of time. *See Midwest, supra*, 70 FCC 2d at 1495 n.11. Thus, even if Mr. Woods were proposing to work at the station for at least twenty hours per week on a long-term basis, Woodscom would deserve far less quantitative integration credit than Pears, whose award of full quantitative credit is uncontested. The disparity is still wider in light of the temporary nature of Mr. Woods' specific commitment. Because it deserves only partial quantitative integration credit, at best, and because it has been charged with a substantial diversification demerit, 5 FCC Rcd at 5868 ¶ 86, that it has not challenged, Woodscom is comparatively inferior to Pears, which receives full quantitative integration credit and no diversification demerit.[3]

**C. Caldwell**

12. In order to receive credit for integration an applicant must prove that its principals can be relied upon to carry out their ostensible commitments to participate in station management. Hence, an applicant that claims credit for the proposed fulltime involvement of a principal who currently has a fulltime occupation must credibly prove that the principal intends to quit or curtail his

existing employment in the event that the applicant receives a grant, as a pledge to work at a station for forty or more hours per week while retaining another fulltime job does not merit credence. *Cuban-American Ltd.*, 5 FCC Rcd 3781, 3785 ¶¶ 28-29 (1990). Moreover, the Commission does not credit 80 hour work weeks or proposals to maintain two fulltime jobs. *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 ¶ 10 (1987), rev. den. 3 FCC Rcd 4522 (1988). As explained below, Caldwell has not carried its burden with respect to the proposed integration of its forty-nine percent principal, Betty Robinson.

13. Caldwell is a limited partnership. Its sole general partner is a corporation, Caldwell Communications Corp. (CCC), which holds twenty percent of the equity. CCC is owned, in turn, by three women, Betty Robinson, Mary Lou Winters, and Clarice Kenney. Winters and Kenney, who are white, own, in combination, fifty one percent of CCC's outstanding shares of stock; Robinson, who is black, owns forty-nine percent. In affidavits that Caldwell submitted as part of its direct case, Winters and Kenney both pledged to quit their current employment and devote full time to daily station management. Caldwell also submitted an affidavit by Betty Robinson in which she represented that she, too, would work at the station in a managerial capacity for forty hours a week, but, unlike Winters and Kenney, Robinson did not pledge to quit her present job if Caldwell's application were to be granted, either in her affidavit or in her hearing testimony. Mrs. Robinson is employed fulltime as a reading teacher in an elementary school.

14. The ALJ concluded that Caldwell's proposal to integrate Mrs. Robinson is not credible, based on findings that she is financially dependent upon other principals, played no part in CCC's decisionmaking, and had admittedly been offered a stock interest in CCC in order to secure minority and female enhancements for Caldwell, among other things. 5 FCC Rcd at 5865 ¶¶ 58-61, 5869 ¶ 91. Furthermore, the ALJ denied credit for Mrs. Robinson's fulltime integration commitment because she has not pledged to quit her fulltime teaching position and because she intends to continue to devote substantial amounts of time to civic activities. *Id.* at 5866 ¶¶ 69 and 71-72, 5869 ¶ 91.

15. The Review Board disagreed. Concurring in the view of the evidence presented in Caldwell's exceptions, the Board concluded that Mrs. Robinson has been significantly involved in the applicant's decision-making processes and is in no apparent danger of losing her stock in CCC by defaulting on loans from other principals that are secured by the stock. 6 FCC Rcd at 3532 ¶¶ 15-16. The Board also concluded that Robinson's integration commitment is credible despite the absence from the record of an explicit pledge by her to quit her teaching position, asserting that there is ample evidence to show that Mrs. Robinson intends to resign from her current job should Caldwell's application be granted. *Id.* at 3532 ¶ 15. The considerations that it mentioned as bearing upon this latter question are as follows: first, that counsel for Caldwell had alleged at oral argument that the absence from the record of a pledge by Robinson to quit her current employment was merely due to inadvertent omission; second, that Mary Lou Winters, one of the other two co-owners of CCC, had testified that she herself, Robinson, and Clarice Kenney had been chosen to be the co-owners of CCC because they had indicated at an organizational meeting that they were willing to retire or resign from their present occupations; third, that a provision of Caldwell's partnership agreement expressly obliges Robinson, Winters, and Kenney to each devote at least forty hours per week to station management and to set aside conflicting commitments; and finally, that Mrs. Robinson testified that she planned to spend at least forty hours per week in carrying out her assigned functions in station management (*viz.*, Director of Public Service Broadcasting and Director of Community Affairs). *Id.* at 3531 ¶ 10. Pears, Giles, and Woodscom all contend in their applications for review that the Board erred in concluding that Mrs. Robinson's integration commitment is credible.

16. We do not agree with the Board that the evidence in this case supports a finding that Mrs. Robinson would quit her teaching job prior to the new station's commencement of operation if we were to grant Caldwell's application. The statement of counsel at oral argument to which the Board referred, Tr. at 1976, is not evidence in Caldwell's favor, as it was not given at the hearing by a witness subject to cross examination. In any event, the statement lends no support to the Board's finding. Caldwell's counsel at oral argument did not allege that the omission of a pledge by Mrs. Robinson to resign from her teaching position was merely due to inadvertence. He said, rather, that an early draft of the typed declaration that had been prepared for submission with her endorsement as part of Caldwell's integration statement had included such a pledge and that he *did not know* why the pledge had been omitted from the final draft. *Id.* That statement, even if true, leaves open the possibility that the omission had been deliberately made by someone else involved in preparing the declaration.

17. Robinson's testimony that she would work at the station for 40 hours per week is not equivalent to a pledge to resign from her current fulltime employment. The very point in question is the credibility of her ostensible commitment to work at the station fulltime in light of her failure to pledge to resign from her current job. Thus, the Board indulged in circular reasoning in relying upon that commitment as evidence of such an intention. The testimony of Mary Lou Winters that the Board cited is also inconclusive; as evidence of what Robinson may have said at the meeting it is less probative than Robinson's own testimony on point. Mrs. Robinson did not testify that she had expressed willingness to quit her current job in the event of a grant to Caldwell; rather, she merely testified that she and others had indicated at the meeting that they could work at the proposed station. Tr. at 1155. The fact that Caldwell's partnership agreement includes a covenant that the President, Vice President, and Secretary of the general partner shall devote at least forty hours per week to management of the station and shall not engage in other ventures "if . . . such participation would . . . materially interfere with his personal participation in the management of . . . the Station on a full-time basis" also proves little. The covenant is not a definite commitment which would clearly put Robinson, as the Vice President of CCC, under obligation to resign from her current job, and the agreement specifies no remedy for breach of it.

18. The burden was on Caldwell to submit clear evidence that Mrs. Robinson would resign her present position to fulfill her integration commitment if Caldwell were awarded a permit. Caldwell has not met this burden. We therefore hold that the Board erred in giving credence to Mrs. Robinson's fulltime integration commitment. Consequently, Caldwell deserves only 51 percent integra-

tion credit, at most. *See Cuban-American, supra*, 5 FCC Rcd at 3786 n.3.[4] As this holding has dispositive significance, we do not find it necessary to address the appellants' contentions that Caldwell's integration plan is unreliable for reasons aside from its failure to establish that Mrs. Robinson intends to give up her teaching position in the event that Caldwell were to receive a grant.

**D. Giles TV**

19. Giles TV is a two-tier stock corporation that was formed by a merger between two former applicants in this proceeding, Love Television Partnership and Jimmy V. Giles. Mr. Giles, who is black and who proposes to work fulltime as the station's general manager, owns all of the voting stock of Giles TV. Giles TV therefore claims full quantitative integration credit enhanced by credit for minority ownership, broadcast experience, and future residence. Concluding, however, that Giles TV is partially controlled by its nonvoting stockholder, Love Television Partnership, which has 60 percent of the corporation's equity, the ALJ held that Giles TV is only entitled to 40 percent integration credit. 5 FCC Rcd at 5868 ¶ 88. The Review Board declined to review that ruling, as it held that Giles TV is comparatively inferior to Caldwell even if Giles TV deserves full quantitative integration credit. 6 FCC Rcd at 3530 ¶ 4. As we do not concur in the Board's conclusion that Caldwell deserves full quantitative integration credit, we cannot rely upon its concomitant ruling that the issue of Giles TV's entitlement to full integration credit is immaterial.

20. Giles TV maintains that the ALJ based the holding in question on findings that are at odds with the evidence or that are immaterial, but we agree with the ALJ that Giles TV is entitled to no more than 40 percent integration credit. We so hold because we conclude, after reviewing the record, that the evidence does not demonstrate that its voting stockholder would exercise exclusive control over its affairs.

21. Mr. Giles, as President and sole Director, endorsed an amendment of Giles TV's certificate of incorporation that was duly filed with the Secretary of State for the state of Delaware on May 23, 1989. Giles TV Exh. 1. The amendment was inserted at Love's request, prior to its disbursement of money to fund the applicant as it was obliged to do under the parties' merger agreement and after the filing of the applicant's original certificate of incorporation. Its avowed purpose was to protect the interests of nonvoting stockholders from invasion by the voting stockholders by barring the latter from diluting the equity of nonvoting stockholders by issuing more shares of stock without their permission. Giles TV Exh. 1; Tr. at 874-76.

22. The amendment, which augmented the rights of nonvoting stockholders at the expense of Mr. Giles' prerogatives as Director and sole voting shareholder, was included at Love's insistence and with Giles' acquiescence *after* the formation of the corporation and as a precondition of funding by Love. This shows that Love has been involved in the affairs of Giles TV and thus the applicant has failed to demonstrate that Love will remain passive. In this regard, it is clear that

> where an owner has assumed an active role after the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the "passive" owner's involvement.

*Coast TV*, 5 FCC Rcd 2751, 2753 ¶ 26 (1990); also see *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 9 (1990). Attribution of at least the passive owner's equity interest is the necessary result when an applicant seeks full integration credit and the record shows that its principals have failed to adhere to the organization's two-tiered arrangement. Because the record shows that Love was willing and able to refuse to carry out its obligation to pay for its stock interest until requested changes were made in the applicant's certificate of incorporation, there is no assurance that the applicant will adhere to its organizational structure in the future. Thus, the applicant has not met its burden of demonstrating the reliability of its two-tiered arrangement.

**CONCLUSION**

23. As Pears deserves full quantitative integration credit, as it is not charged with any diversification demerit, and as no other applicant is entitled to comparable quantitative integration credit, we hold that its qualifications are superior to those of any of the other competing applicants in this proceeding.

**ORDER**

24. ACCORDINGLY, IT IS ORDERED that the Review Board's decision, 6 FCC Rcd 3529, IS MODIFIED as indicated above; that the application for review filed by Pears Broadcasting, Inc. on July 17, 1991 and the application of Pears Broadcasting for a construction permit for a new television station on Channel 11 serving Columbia, Louisiana (BPCT-871109KF) ARE GRANTED; that the applications for review filed by Woods Communications Group, Inc., on July 15 and by Giles Television, Inc. on July 17 ARE GRANTED IN PART, to the extent indicated above, AND ARE OTHERWISE DENIED; and that the applications of Woods Communications Group, Inc. (BPCT-870904KJ), Giles Television, Inc. (BPCT-871110KE), and Caldwell Broadcasting Limited Partnership (BPCT-871110KH) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] Woods Communications Group, Inc. (Woodscom) filed an application for review on July 15, 1991, and Pears Broadcasting, Inc. (Pears), and Giles Television, Inc. (Giles TV) filed applications for review on July 17. Caldwell Broadcasting Limited Partnership (Caldwell) filed oppositions on July 30 and August 1, 1991, and Pears and Giles did so on August 1. Caldwell filed a

correction to its August 1 opposition on August 15. KTVE, Inc. did not file an appeal, and the Board's denial of its application is therefore final.

[2] Despite the ALJ's exclusionary ruling, the exhibit is included in the hearing docket, and we have taken notice of its content.

[3] Woodscom also claims enhancement credit for Mr. Woods' Native American ancestry, but such a qualitative factor has no decisional significance in light of the dispositive quantitative disparity in these proposals.

[4] In the *Cuban-American* case, the Review Board inferred from circumstantial indications that a principal named Molina who was currently employed for more than 40 hours per week would quit his current employment in order to work fulltime as station manager if the applicant in which he had an interest were to obtain a permit, despite the absence from the record of an explicit promise from him to that effect. The Commission reversed, holding that as there was no promise in evidence from Molina to curtail his current employment the applicant had failed to establish that he would carry out his fulltime integration commitment. *Id.* at 3785 ¶ 28.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-106**

In re Applications of

| | |
|---|---|
| INTERMART BROADCASTING GULF COAST, INC. | File No. BPH-880224MN |
| SOUTHWEST FLORIDA FM BROADCASTING, LTD. | File No. BPH-880303MG |
| BYRON DOUGLAS KIGHT & MARY GIGLIA MARTINEZ JOHNSON d/b/a KIGHT BROADCASTING LIMITED PARTNERSHIP | File No. BPH-880303MH |
| PALM TREE FM LIMITED PARTNERSHIP | File No. BPH-880303MQ |

For Construction Permit for a
New FM Station on Channel 249A
in Punta Rassa, Florida

***Appearances***

*Gary S. Smithwick*, *Arthur Belendiuk*, and *Lisa Thornton*, on behalf of InterMart Broadcasting Gulf Coast, Inc.; *Thomas J. Keller* and *Jacqueline R. Kinney*, on behalf of Southwest Florida FM Broadcasting, Ltd.; *Dennis F. Begley*, *Matthew H. McCormick*, and *Andrew S. Kersting*, on behalf of Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership; *Stephen Diaz Gavin* and *Paula Perrone*, on behalf of Palm Tree FM Limited Partnership; and *Jerry Hermele*, on behalf of the Chief, Mass Media Bureau.

**INITIAL DECISION OF**
**ADMINISTRATIVE LAW JUDGE**
**JOSEPH CHACHKIN**

**Issued: January 3, 1992; Released: January 10, 1992**

**PRELIMINARY STATEMENT**

1. Of the eleven applications for Channel 249A in Punta Rassa, Florida, originally designated for hearing,[1] four applicants remain: InterMart Broadcasting Gulf Coast, Inc. (InterMart); Southwest Florida FM Broadcasting, Ltd. (Southwest); Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership (Kight Broadcasting); and Palm Tree FM Limited Partnership (Palm Tree).[2]

2. The *Hearing Designation Order* indicated that the areas and populations proposed to receive service of 1.0 mV/m or greater intensity, together with the other available primary aural services in these areas, would be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants. *Id.* at ¶ 14.

3. In addition to the standard comparative issue, by *Order*, FCC 90M-3396 (released October 26, 1990), the Presiding Judge designated the following issues against Palm Tree:

> To determine whether Palm Tree FM Limited Partnership is financially qualified to construct and operate its proposed Punta Rassa FM radio station;
>
> To determine whether Palm Tree FM Limited Partnership lacked candor or misrepresented facts in certifying that it was financially qualified to construct and operate its proposed station; and
>
> To determine, in light of the evidence adduced under the foregoing issues, whether Palm Tree FM Limited Partnership possesses the basic qualifications to be a Commission licensee.[3]

4. After a prehearing conference was held on June 8, 1990, hearing sessions were held on October 22, 23, 24, and December 3 and 4, 1990. The record was closed at the conclusion of the hearing session on December 4, 1990. *Order*, FCC 90M-3869 (released December 7, 1990). By *Order*, FCC 90M-3980 (released December 17, 1990), the record was reopened for the limited purpose of accepting into evidence the deposition testimony of Dale C. Edmunds, Vice President of the Bank of New England. The record was then re-closed. Proposed findings of fact were filed February 4, 1991; replies were filed February 25, 1991.

**Findings Of Fact**

**InterMart Broadcasting Gulf Coast, Inc.**

**Ownership Structure and Control**

5. InterMart is a corporation organized under the laws of the State of Florida. James E. Martin, Jr., is President, Treasurer, sole director, and holds 100% of the applicant's stock. Patricia S. Fierro serves as Secretary and Assistant Treasurer, but holds no ownership interest. Harley P. Pa[illegible]erves as Vice President and Chief Financial and Administrative Officer, but he also holds no ownership interest. InterMart Ex. 1, p. 1; Tr. 21-22.

**Integration**

6. No InterMart principal proposes to be integrated into the ownership and management of the proposed station at Punta Rassa, Florida. InterMart Ex. 1, p. 1.

**Diversification**

7. InterMart itself has no other media interests. James E. Martin, Jr., however, is the President, Treasurer, a director, and 100% stockholder of InterMart Broadcasting of Las Vegas, Inc. (IBLV), licensee of Station KLTN(FM), Las Vegas, Nevada. Martin is also President, Treasurer, a

director, and 80% stockholder of InterMart Broadcasting of Orlando, Inc. (IBO), which holds a 30.74% general partnership interest in Radio Orlando, permittee of Station WMMO(FM), Orlando, Florida. Upon consummation of an application (File No. BTCH-900814HH) granted September 28, 1990, IBO will hold a 31.39% interest in Radio Orlando. *Id.*

8. In addition, Martin is President, a director, and a 66.67% stockholder of InterMart Broadcasting Georgia Coast, Inc. (IBGC), licensee of Station WGCO(FM), Jesup, Georgia, and President, Treasurer, a director, and 100% stockholder of InterMart Broadcasting of Holmes Beach, Inc., which holds a one-seventh general partnership interest in 98.7 Partnership, permittee of Station WAYP(FM), Holmes Beach, Florida. *Id.* at 1-2.

9. Harley P. Park is Vice President and Chief Financial and Administrative Officer of IBLV, IBO and IBGC. Patricia S. Fierro is Secretary and Assistant Treasurer of IBLV, IBO and IBGC. *Id.* at 2.

**Auxiliary Power**

10. InterMart proposes to install auxiliary power facilities. *Id.*

**Southwest Florida FM Broadcasting, Ltd.**

**Ownership Structure and Control**

11. Southwest is a limited partnership organized under the laws of Florida. Since the filing of Southwest's application, the sole General Partners has been J. Lynn Stephens, a 70 year old female, who holds, as General Partner, a 21% equity interest. Stephens now also holds a 69% limited partnership interest. The remaining 10% of the equity is now held by Limited Partner Mary Louise Corey. Southwest Ex. 1, pp. 1-2.

12. As of the April 20, 1990, deadline for the filing of integration statements in this proceeding, Southwest had 26 Limited Partners. Southwest Ex. 7. Each of these individuals held a 3% equity interest with the exception of Eva Nelle Sidden, who held a 4% interest. *Id.* The withdrawal of these individuals from the partnership is discussed at ¶¶ 26-27, *infra.*

**Preparation and Prosecution of Application**

13. Stephens first learned of the Punta Rassa allocation through a telephone conversation with Tony Rizzo, a broker for Blackburn and Company.[4] After indicating he wanted to put Stephens back in the radio business, Rizzo informed her that he knew a gentleman named Carl Hurlebaus who was interested in putting an application in for the Punta Rassa allocation. Rizzo wanted to know whether Stephens would like to talk to him. Tr. 37-38. Stephens spoke with Hurlebaus the following day. Hurlebaus informed Stephens he was the President of Capital Radio Services, Inc. (Capital Radio) and that there were investors who were interested in filing an application for the proposed Punta Rassa station. Hurlebaus said that Rizzo had told him about her having had a station the previous year and thought Stephens might be interested in a station near her home. Tr. 39-40. Hurlebaus also mentioned to Stephens the possibility of her being a General Partner in a limited partnership. At this point, Stephens questioned why it had to be a limited partnership. Hurlebaus told her it could be any structure she and the group decided on. He informed her that he believed an investment group would find value in having an experienced local person head their group, and would probably be willing to offer her an equity interest in the partnership for performing those functions necessary to process an application. Tr. 40-41. Stephens believes Hurlebaus later forwarded her some forms which may have included a questionnaire containing a list of people who were interested in being a part of the applicant. Tr. 45. Stephens is certain she saw a list containing the names of the limited partners when Thomas Keller, Southwest's communications counsel sent her a copy of the partnership agreement for her to file in Tallahassee. The list also included the equity percentages for each of the investors. Tr. 45.

14. Southwest filed its Certificate and Agreement of Limited Partnership with the State of Florida on March 2, 1988. Southwest Ex. 8. Southwest's communications counsel, Thomas Keller, decided the applicant should take the form of a limited partnership and drafted the limited partnership agreement. Stephens signed the affidavit attached to the agreement on February 29, 1988. Tr. 40, 46, 57. The affidavit, *inter alia*, contains a list of the 26 original Limited Partners as well as their respective initial capital contributions. According to the affidavit, 25 of the Limited Partners had contributed $3,000 to the applicant, and one had contributed $4,000. Thus, the affidavit avers that the partnership had received $79,000 in initial capital contributions. *See* Kight Ex. 5. The list of Limited Partners and their initial capital contributions was prepared by Keller. As of the time Stephens signed the affidavit, several Limited Partners listed had not yet signed the limited partnership agreement. Tr. 46.[5]

15. Stephens has no knowledge of who decided what the total capitalization of the applicant was going to be, nor does she know who determined the respective ownership percentages each investor would have or how much each investor would pay for his or her ownership interest. Tr. 50-51. At the time Southwest's application was filed, Stephens also had no knowledge of whether the Limited Partners listed in the affidavit attached to the limited partnership agreement had, in fact, made their capital contributions, and she took no action to determine whether any of the initial capital contributions reflected in the affidavit had actually been made. She stated that the initial capital contributions were not her responsibility, but, rather, were the responsibility of whoever was putting together the group of investors. Tr. 47-49, 55, 84. Stephens did not learn which Limited Partners had made their initial capital contributions until she received from Capital Radio K-1 federal tax returns for 1988. Stephens forwarded to the limited partners the 1989 K-1 federal tax returns. Tr. 49, 94-95.

16. Stephens did not have any contact with any of the original Limited Partners prior to the filing of Southwest's application. Her only subsequent contact occurred in April 1990 when Robert Tyvoll advised her that he wanted to withdraw from the partnership. Tr. 51-52. Stephens has no knowledge of what the original Limited Partners were told regarding the proposed Punta Rassa station, who recruited them, how they were recruited, when they were recruited, or if they were all recruited before or after the partnership agreement was filed. Tr. 44, 50. She also has no knowledge of whether the original Limited Partners were provided anything in writing regarding the

financial prospects of the proposed Punta Rassa station or what, if anything, they were told regarding the financial prospects of the station. Tr. 77.

17. Stephens presumes the original Limited Partners made their initial capital contributions payable to Capital Radio because Capital Radio ultimately advanced funds to her for the processing of Southwest's application. Tr. 47, 53. Stephens did not see any of the money or checks reflecting the Limited Partners' initial capital contributions, nor did she have any knowledge of what transpired between the Limited Partners and Capital Radio. She had no knowledge of whether Capital Radio established a bank account for the applicant. Tr. 84-85. Stephens established a bank account for Southwest in February 1988. The funds she received came from Capital Radio. Tr. 84-85.

18. Stephens had an oral understanding with Hurlebaus regarding the percentage of funds invested by the Limited Partners that she was to receive. Stephens stated Hurlebaus simply advised her that whatever funds were necessary to prosecute the application would be available. Tr. 56. Either Capital Radio or Hurlebaus forwarded her funds to pay the application filing fee, the Florida State filing fees, legal fees for the prosecution of the comparative issue by Verner, Liipfert, and additional money for miscellaneous expenses. When it became necessary to pay the FCC hearing fee, Stephens telephoned Hurlebaus and he forwarded her the necessary funds. Stephens did not receive any funds to pay engineering fees, however, and was never informed of the amount of those fees. Stephens assumes Hurlebaus paid all of the engineering fees directly. In all, Capital Radio and/or Hurlebaus forwarded Stephens approximately $40,000. Tr. 54-55, 57, 69.

19. A document titled, "Capital Radio Services, Inc. FM Service Agreement for Owner/Manager," dated February 14, 1988, recites that Stephens retained Capital Radio to serve as a general contractor to assist in preparing and filing her application. The agreement further provides, *inter alia*, for the following services:

> Introducing you to other potential owners who are interested either in active management or passive investment, whom you may want to join with you to form an entity to apply for the new station;
>
> Assisting you in the acquisition of transmitter site and documentation of site data;
>
> Preparing all engineering requirements of FCC Form 301;
>
> Recommending counsel for full legal representation before the FCC through all comparative proceedings and decision by an Administrative Law Judge.

Kight Ex. 6. The service agreement further states:

> Your cost for Capital's exclusive application services shall be a total fee of $ *See Attached Promissory Note*, payable upon execution of this agreement. As part of a group which will cause a legal entity to be formed for the purpose of filing the application, you agree to purchase 21% of ownership in the group, and we shall notify you promptly of the identity of other potential members of the group.

Kight Ex. 6.

20. Hurlebaus located Southwest's original transmitter site. This was one of the services Southwest had contracted with Capital Radio to provide. Tr. 58. Capital Radio hired the consulting firm of Shaffer & Associates, Inc. to locate and secure the use of the original transmitter site specified by Southwest. Stephens had no role in selecting the applicant's original transmitter site other than communicating with Keller to ensure that the site was being located. Tr. 59-60. She was not informed in advance that Shaffer & Associates would be used to locate the applicant's transmitter site, has never spoken with anyone regarding the cost of Shaffer & Associates' services, and has not had any contact with Shaffer & Associates regarding the location of either Southwest's original transmitter site or its amended site. Tr. 60-61.

21. Stephens has also never had any contact with the owner of the originally specified site. She did not know under what terms the original site would have been available, but assumed it would have been a lease arrangement because "that's customary." Tr. 61-62. After the Federal Aviation Administration notified Southwest of a problem with the applicant's originally specified site, Stephens assumed Shaffer & Associates then made the decision as to where the new transmitter site would be located. Stephens had no role in selecting the new site or in establishing the terms under which that site would be available to Southwest. Stephens has never spoken to the owner of the property, but assumes that Shaffer & Associates negotiated with the owner to deliver an acceptable transmitter site to Capital Radio. Tr. 63-64. Stephens recalls seeing a document showing the name of the owner of the property. Tr. 64. In this regard, Keller sent Stephens a letter dated August 24, 1988 from Shaffer & Associates to Sachs Freeman Associates attaching a signed statement from the property owner agreeing to make the property available. Southwest Ex. 2; Tr. 89-91. Also, in February 1988, Keller sent Stephens a letter from Shaffer & Associates to Capital Radio accompanied by a letter from Capital Radio to Stephens assigning use of the site to Southwest. Southwest Ex. 3; Tr. 91-92.

22. In addition to locating the applicant's transmitter site, Capital Radio selected Sachs Freeman to serve as the applicant's engineering firm. Stephens asked Hurlebaus for the names of communications attorneys he considered well qualified. Hurlebaus provided Stephens with a list of four communications attorneys from which she selected Keller.[6] Tr. 64-66, 87. Stephens dealt solely with Keller regarding the financial terms under which Keller's firm would represent Southwest. Stephens had no discussions with Hurlebaus regarding such financial terms. Tr. 64-65.

23. Following her contacting Keller's firm, Keller sent her a Form 301 and a Form 396A (Model EEO Program). The attached letter detailed the items to be completed in order to timely file the application. Southwest Ex. 4. Keller's enclosure to Stephens included a letter describing the billing policies and procedures of the firm which Stephens accepted on behalf of Southwest. Southwest Ex. 5; Tr. 92-94. Stephens has been involved in every aspect of the application with the exception of locating a transmitter site and the engineering. However, as the exhibits discussed, *supra*, attest, she was kept abreast of the efforts to secure a transmitter site. She and Keller discussed on the phone decisions made in connection with the application. Also, she personally prepared the EEO section of the application. Further, prior to Keller's send-

ing the letter to the limited partners, discussed in paragraph 26, *infra*, Keller and Stephens fully discussed the matter. Tr. 106-107; Southwest Ex. 6.

24. As noted above, the Capital Radio service agreement reflects Stephens' 21% ownership interest in the applicant. Stephens stated she and Hurlebaus reached a mutual agreement that her ownership percentage would be 21%. Tr. 42-43. Section 2.01 of the limited partnership agreement states that the General Partners' capital contributions shall be $21,000, comprised of $2,500 in cash and $18,500 in services which the General Partner promises to perform on behalf of the partnership. *See* Southwest Ex. 8, p. 3. The service agreement also provides that Stephens may issue a promissory note upon execution of the agreement. *See* Kight Ex. 6. Stephens states that she and Hurlebaus discussed a promissory note in the amount of $2,500. She does not recall to whom the promissory note was to be payable, however, because she never saw the note. Tr. 41. In any event, the promissory note was only to be payable if the station's profits were in excess of $2,500. Tr. 42.

25. As of the date of the hearing, Stephens had not put any money into Southwest other than out-of-pocket expenses for travel, postage and telephone calls. However, she has incurred an obligation of several thousand dollars in legal fees to Southwest's communications counsel for work performed in connection with the filing of an opposition to the petition to enlarge issues filed by Kight Broadcasting. Tr. 68-69, 106. The retainer agreement entered into by Verner Liipfert and Stephens on behalf of Southwest provided for a fixed fee for representing Southwest in connection with the comparative issues. The money for such services was paid from funds received from Capital Radio. The retainer arrangement, however, did not include representation with respect to issues added or sought to be added. Tr. 69; Southwest Ex. 5.

26. Capital Radio, through Hurlebaus, eventually offered the original Limited Partners of Southwest a reimbursement of their initial capital contributions. Tr. 67. The offer was discussed in a letter dated November 13, 1989, from Hurlebaus to Keller, which stated in part:

> When we last spoke, you raised the subject of the media attention recently directed at Sonrise Management Services, Inc. and the apparent "prosecution mentality" of both FCC staffers and other members of the communications bar toward that company.
>
> You also expressed concern that this negative attention toward Sonrise could unfairly prejudice the applicant you are representing before the FCC for whom we provided various consulting services. You and I agree that the services provided by Capital were very different from the "turnkey" work apparently provided by the Sonrise Company. In fact, Capital served only to bring together interested parties in applying for certain FM stations, provided technical application work, and referred them to lawyers such as yourself for structuring and filing new applications. Hence, I feel certain that we have complied with FCC regulations and there would be no basis whatsoever for any allegation to the contrary.
>
> Nevertheless, these recent developments could result, as you suggest, in the necessity for you to defend against allegations related to "Sonrise-type" issues. This could necessitate the Limited Partners having to raise additional monies for you to provide legal services beyond the standard comparative issue. In keeping with our policy, we do not feel these parties should be left with the sole option of paying additional legal fees with the possibility of ongoing capital calls to defend their position.
>
> Accordingly, we are preparing to offer the partners in the Punta Rassa application a *full refund* of their original fees paid towards their applications. In exchange, we would, of course, require the execution of a release.

. . .

Southwest Ex. 6, p. 9.[7] Hurlebaus made the decision to offer the refund on his own. Stephens had nothing to do with the refund process. Tr. 67-68, 85.

27. Following discussions between Keller and Stephens regarding Hurlebaus' previous involvement with Sonrise Management Services, Inc. (Sonrise) and the engineering firm of Sachs Freeman, Keller sent Stephens a letter containing an analysis of the possibility that a competing applicant might attempt to raise a Sonrise-type issue against Southwest in this proceeding. *See* Southwest Ex. 6, pp. 5-6; Tr. 70-71. In May 1990, pursuant to Stephens' instructions, Keller sent copies of that letter to all of the original Limited Partners of Southwest along with a ballot form in which the partners were able to choose to accept a full refund and withdraw from the partnership, or elect to stay in the partnership with the understanding they may be called upon to produce documents, travel to Washington at their own expense for a deposition, and respond to a capital call which was estimated to be approximately $500 per percent of their original investment. Southwest Ex. 6, pp. 5-6, 9-11; Tr. 71. Southwest's original limited partners accepted the refund offer and Hurlebaus reimbursed their initial capital contributions to the applicant.[8]

**Integration**

28. Stephens proposes to work on a full-time basis (40 hours per week) as General Manager of Southwest's proposed Punta Rassa station. As General Manager, Stephens will have responsibility for managing the station and supervising its employees. She will have exclusive authority regarding matters of station management, including, but not limited to, programming, news, sales, finances and personnel. Southwest Ex. 1, pp. 2-3.

29. Stephens is currently a 50% co-owner of a marketing firm which she established in 1969, Stephens/Lane & Associates, and presently does part-time consulting work for this firm. Tr. 84, 103. To the extent any part-time consulting work for Stephens/Lane & Associates interferes in any way with her ability to work at the proposed station on a full-time basis, Stephens will withdraw from and/or decline her part-time consulting work. Southwest Ex. 1, 1; Tr. 104.

30. Stephens resides at 4865 Abadan Street, Northport, Florida. Northport is located within Sarasota County which is immediately north of Charlotte County. Punta Rassa is located within Lee County which is to the immediate south of Charlotte County. No part of Southwest's

original 1.0 mV/m contour extends into Charlotte County or Sarasota County.[9] Tr. 36; Kight Ex. 4. Stephens intends to either commute on a daily basis between Northport and Punta Rassa, a drive of approximately 50 minutes, or purchase a condominium or rent an apartment in or near Punta Rassa and live there during the work week. If Stephens decides to reside in Punta Rassa during the week, she will return to Northport each weekend. Southwest Ex. 1, p. 1.

31. From approximately 1978 to 1981, Stephens served as a member of the board of directors of public broadcasting Station WSFP-FM, Fort Myers, Florida. All of the board meetings were held in Fort Myers which is within the service area of Southwest's proposed station. Southwest Ex. 1,, p. 3. From 1981 to 1986, Stephens served as Chairman of the Board of Trustees of St. Joseph Hospital, located in Port Charlotte, Florida, which is within Charlotte County. *Id.*; Tr. 79. In this capacity, Stephens met with hospital administrators from the tri-county area consisting of Collie,[10] Lee, and Charlotte counties, and was involved in addressing issues regarding the adequacy of health care services throughout the entire tri-county area, including the area to be served by Southwest's proposed Punta Rassa station. Southwest Ex. 1, pp. 3-4.

32. She also has served as a director of the Charlotte County Chamber of Commerce; Chairman of the Charlotte County Code Enforcement Board; President of the Board of Trustees of the Charlotte County Surgicenter; President of the Charlotte County YMCA; Chairman of the Board of Trustees of the St. Joseph Life Enrichment Center; President of St. Charles Housing, Inc., a low-income housing facility; and charter member of the Advisory Board of the Charlotte County Vocational-Technical Center. Ex. 1 at 4-5. As discussed above, Southwest's pertinent 1.0 mV/m contour does not include portions of Charlotte County. Southwest did not offer evidence showing a nexus between the listed organizations and the residents of the proposed service area.

33. From 1954 until 1959, Stephens was employed at Station WLRP, New Albany, Indiana. Stephens served as Sales Manager of the station for two years out of that four-year period, and Assistant Station Manager for the remaining two years. From 1963 to 1965, Stephens served as the General Manager and corporate secretary-treasurer of Station WCCF, Punta Gorda, Florida. Southwest Ex. 1, pp. 5-6.

34. From 1976 to 1981, Stephens was President and General Manager of Station WEEJ, Port Charlotte, Florida. A corporation in which Stephens was the majority stockholder, Charlotte Broadcasting Corp., applied to the FCC for the construction permit for that station. Upon grant of Charlotte Broadcasting's application, Stephens oversaw the construction and operation of the station until it was sold in 1981. *Id.* at 6. Stephens has not held a management position in broadcasting since 1981. Tr. 87.

**Diversification**

35. Neither Southwest nor any of its partners has any ownership interest in any broadcast station or any other medium of mass communications. Southwest Ex. 1, p. 2.

**Auxiliary Power**

36. In the event its application is granted, Southwest will install auxiliary power generators at both its studio and transmitter site. Southwest Ex. 1, p. 6.

**Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership**

**Ownership Structure and Control**

37. Kight Broadcasting is organized under the laws of Florida. Its partners and their respective voting and equity interests are as follows:

| Name | Partnership Interest | Voting Interest | Equity Interest |
|---|---|---|---|
| Byron Douglas Kight | General | 50% | 40% |
| Mary Giglia Martinez Johnson | General | 50% | 20% |
| Phillip Memoli | Limited | 0% | 40% |

38. In the event of a dispute between the General Partners, the vote of Byron Douglas Kight shall control. Kight Ex. 1.

**Preparation and Prosecution of Application**

39. Kight heard about the Punta Rassa channel allocation in late December 1987. He learned of it either by reading about it in a publication or from Ron Pierce, a friend, who is a retired broadcaster. Tr. 129-130. After deciding to pursue the allocation, Kight telephoned Phillip Memoli, a former client when Kight was employed at a television station and a friend of Kite for 15 or 16 years. Tr. 130. Memoli expressed interest in the potential investment opportunity and Kight and Memoli met in early January 1988 to further discuss the allocation. After contacting Memoli, Kight also discussed the allotment and the prospects of applying for it with Dennis Begley, his present counsel. Kight does not recall how he knew about Begley. He believes that either someone recommended him or he had prior dealings with him in his broadcast career. Tr. 134-135.

40. Following his conversation with Begley, Kight called Mary Johnson and briefly apprised her of the opportunity and arranged a meeting to discuss the matter further. Tr. 135. Kight contacted Johnson because he believed she would be a strong addition to the group. Kight states that Johnson was a long time local resident, a broadcaster, as well as a female and minority member. Tr. 134. Also, Johnson, based on her broadcasting background, is able to run a news operation and handle public affairs, areas in which Kight has no prior experience. Tr. 182-183. Kight and Johnson knew each other from WBBH TV 20 where they worked together. Tr. 231. Johnson knew Memoli from her working at that station, his business ventures, and Memoli's involvement in the arts and community affairs in the Lee County area. Tr. 231.

41. Kight, Johnson and Memoli met in mid-January 1988 in a local restaurant. Tr. 136; 230-231. At the meeting, Kight proposed that he and Johnson become general partners of the venture. Johnson did not agree to join the

partnership at that meeting but agreed to the proposal within a week. Tr. 140-141, 232-233. Also, at the restaurant meeting, Kight proposed the partnership percentage splits to be received by Memoli, the limited partner, and Kight and Johnson, the general partners. Tr. 136-137.

42. Kight Broadcasting's lawyer prepared the limited partnership agreement after consultation with Kight and Johnson. Tr. 156, 237. All the partners received copies to review prior to executing the document. Tr. 156. The limited partnership agreement provides for the partners to make contributions covering three separate phases. The purpose of establishing the various phases is to cover costs through grant of a construction permit. The first phase concerns activities involved in the processing of the application. Under the partnership agreement, during Phase 1, Kight was to contribute $2,000 and Johnson $1000. Kight Ex. 8, p. 31; Tr. 14, 142, 232, 234. In May 1990 Johnson made her phase 1 contribution of $1,000 as well as the $1,000 *pro rata* share of her phase 2 capital contribution. Johnson didn't make her phase 1 contribution earlier because Kight didn't ask for the contribution until May 1990. Kight asserted, in this regard, that more funds were not needed prior to designation. Tr. 165, 184-185.

43. Kight is relying on a bank letter from the Barnett Bank dated February 12, 1988. The letter resulted from a meeting at the bank in which Kight and Memoli were present. Tr. 171-172. Kight set up the meeting and was instrumental in approaching the bank for the letter. Tr. 253. Kight and Johnson discussed his going to the bank prior to the meeting with a bank official. Tr. 253. The bank letter requires a personal guaranty from Johnson and Kight. Tr. 254. Memoli's continued participation in Kight Broadcasting is not a condition of issuance of a bank loan. Tr. 173.

44. Memoli's participation in Kight Broadcasting's activity has been limited to his attending the pre-formation meeting and his involvement in obtaining the loan letter, discussed, *above*. Both of these events occurred prior to execution of Kight Broadcasting's limited partnership agreement on February 24, 1988. *See* Kight Ex. 8, pp. 33-35. Kight Broadcasting's certification of limited partnership was executed on March 4, 1988. *Id.* at 3-4. There is no evidence that Memoli actively participated in the applicant's affairs after the adoption of its ownership structure.

45. Every significant aspect of the applicant's affairs has been handled by either Kight or Johnson. These include locating a limited partner, Tr. 131, preparing a budget for the estimated construction and initial operating expenses, Tr. 154, selecting and retaining FCC counsel and an engineer, Tr. 135, 158-159, 235-236, and locating the applicant's transmitter site. Tr. 234.

46. While it appears that Kight has carried more of the laboring oars, Johnson has also been actively involved in the preparation and prosecution of the application. Johnson participated in a February 1988 meeting with Kight and Memoli in which they discussed the appropriate legal structure for the applicant. Tr. 133. She also participated in the drafting of the applicant's limited partnership agreement and reviewed a draft version of the agreement from FCC counsel prior to the date she signed the agreement. Tr. 237, 249, 156. Also, while Kight visited the transmitter site and ordered the engineering study, Johnson was kept fully informed and Kight called her whenever a decision had to be made regarding the site. Further, Johnson was sent copies of the engineering study. Tr. 234. In addition, Johnson worked with Kight in preparing a budget for the proposed station, and prepared the EEO section of Kight Broadcasting's application. Tr. 154, 239, 240. In preparing the EEO portion of the application, Johnson explained that her position with the School Board had enabled her to become well acquainted with EEO programs, and she considered educational institutions and other organizations which would provide the station with a broad range of minority applicants, rather than from merely one segment of the minority population. Tr. 239. Johnson is also a co-signator on the partnership bank account and has written a check drawn on that account. Tr. 147, 169-170.

**Integration**

**Byron Douglas Kight**

47. In the event Kight Broadcasting's application is granted, Kight will work at the Punta Rassa station on a full-time basis (a minimum of 40 hours per week) as General Manager. Serving in this capacity, he will supervise all station operations, including programming, sales, financial and engineering matters. Kight Ex. 2, p. 1.

48. Since February 1990, Kight has held a minority stock interest (36%) and has been the full-time manager of Naples Auto Air d/b/a Modern Auto Air. *Id.*; Tr. 177, 180. Kight will terminate his employment with Modern Auto Air prior to the commencement of program tests at the proposed station. Kight Ex. 2, p. 1. A new manager, Tony Craig, has been trained by the company and is available to assume Kight's duties at any time in the event Kight Broadcasting's application is granted. *Id.*; Tr. 116. Kight's skills as manager of Naples Auto Air are not unique and his duties are presently performed by his designated successor -- Tony Craig -- in his absence. Tr. 181-183. The controlling stockholder of Modern Auto Air, Lindsay Burhans, will also begin to oversee the operation on a part-time basis to ensure its continued successful operation. Kight Ex. 1, p. 1; Tr. 116-117. The controlling stockholder has been aware of Kight's intent to leave in the event the Kight Broadcasting application is granted since "the first day [he] went to work in the air conditioning business." Tr. 180. Accordingly, Kight will have no commitments that will interfere with his duties as full-time General Manager of the station. Kight Ex. 2, p. 1.

49. Kight has resided within the service area of the proposed Punta Rassa station since February 1972, and will continue to reside in the proposed service area in the event Kight Broadcasting's application is granted. Kight has resided at his present address of 833 Iris Drive, North Fort Myers, Florida, since 1975. From approximately 1973 to 1975, Kight resided on Fifth Avenue in South Fort Myers, Florida. Prior to that time, he resided on San Mateo Drive in Fort Myers, Florida. Kight Ex. 2, p. 2.

50. Kight served as a fundraiser and promoter of a golf tournament for the benefit of the Sickle Cell Anemia Association, the Heart Association, and the United Way in Fort Myers, Florida, in 1987. He also served as a fundraiser for the Care and Rehabilitation of Wildlife on Sanibel in Fort Myers, Florida, in 1986. *Id.*

51. In addition, Kight served as a charter member of the Advertising Federation of Southwest Florida, and a fundraiser for the Southwest Florida Sports Association (fundraiser for various charitable causes) in Fort Myers, Florida, from 1979 to 1987. *Id.*

52. From 1985 to April 1987, Kight served as Executive Vice President and General Manager of Station WQEZ(FM), Fort Myers Beach, Florida. In his capacity as General Manager, Kight supervised approximately 15 employees all of whom reported directly to him. *Id.*; Tr. 123. From 1972 until 1985, Kight was employed at Station WBBH-TV, Fort Myers, Florida. Kight was initially employed as a technical director, and later became involved in the production of television commercials and directing newscasts during which time he supervised other employees. Kight Ex. 2, p. 2; Tr. 125. From the latter part of 1973 until early 1974, Kight also served as a weekend sportscaster for the television station. He held the title of Account Executive between 1975 and 1980, and served as Sales Manager from 1980 until 1985. Kight Ex. 2, pp. 2-3.

53. Prior to his employment with Stations WEQZ(FM) and WBBH-TV, Kight served as an announcer, Program Director, and engineer at Station WUOK(AM), Cumberland, Maryland, from 1966 to 1967, and from 1969 through 1972. During the time he served as Program Director, there were five announcers at the station who reported directly to him. Kight Ex. 2, p. 3; Tr. 128. During the period between 1967 and 1969, Kight served as a transmitter/receiver specialist for the United States Navy. He returned to his employment with Station WUOK upon return from active duty. Kight Ex. 2, p. 3.

54. From 1965 to 1966, Kight was employed at Station WTBO(AM), Cumberland, Maryland. *Id.*

**Mary Giglia Martinez Johnson**

55. In the event Kight Broadcasting's application is granted, Johnson will work at the Punta Rasss station on a full-time basis (a minimum of 40 hours per week) as News and Public Affairs Director. Serving in this capacity, Johnson will be responsible for supervising all aspects of the station's news and public affairs operations, including news gathering, producing and directing public affairs programming, and ascertaining the needs and interests of the listening audience. Kight Ex. 3, p. 1. She will hire, supervise, and train a staff of at least four individuals who will be working directly under her at the proposed station. Tr. 254.

56. Johnson is presently employed on a full-time basis as the Coordinator of Foreign Language and Bilingual Education for the Lee County School Board. She will retire from her employment with the School Board prior to the commencement of program testing at the proposed station. Johnson is also employed on a part-time basis as Director of Community Affairs for Station WBBH-TV, Fort Myers, Florida. In the event Kight Broadcasting's application is granted, however, Johnson will also terminate her employment with Station WBBH-TV prior to the commencement of program tests at the proposed station. She will have no other commitments to interfere with the performance of her duties as full-time News and Public Affairs Director of the proposed station. Kight Ex. 3, pp. 1-2.

57. Johnson has served as Coordinator of Foreign Language and Bilingual Education for the Lee County School Board since 1967. Her responsibilities have included the supervision and administrative of programs and services related to the educational and other needs of non-English origin students in kindergarten through the twelfth grade. She has also supervised all foreign language instruction. Kight Ex. 3, pp. 2-3. In her position with the School Board, Johnson directly supervises nine employees, and has indirect supervisory responsibility for another 50 employees. She has supervised hiring for the School Board for approximately 20 years. Tr. 298-299.

58. In addition to having taken 40 hours of in-service workshops on trends and research in education during the 1989-1990 school year, Johnson has the following educational background:

> Bilingual Education Endorsement - University of Miami, Miami, Florida (1977-1979)
>
> Education Certification - University of South Florida, Tampa, Florida (1975-1977).
>
> Masters in Arts, Spanish - Technologico de Monterrey, Mexico (1965-1970).
>
> National Defense Education - Act Institute, San Miguel, Allende, Mexico (1964-1965).
>
> National Defense Education - Act Institute, University of Florida, Gainesville, Florida (1964).
>
> B.A., Math and Philosophy - Wesleyan College, Macon, Georgia (1947).

Kight Ex. 3, pp. 3-4.

59. Johnson has resided at her present address of 1260 Vesper Drive, Fort Myers, Florida, since 1980. This address is within the city-grade (3.16 mV/m) contour of the proposed station. From 1960 to 1980, Johnson resided at 1624 Pawnee Avenue, Fort Myers, Florida. The Pawnee Avenue address is also located within the service area of the proposed station. Johnson will continue to reside in the service area of the proposed station in the event Kight Broadcasting's application is granted. Kight Ex. 3, p. 2.

60. Johnson has been involved in the civic activities set forth below. Unless otherwise indicated, all of the activities occurred within the Fort Myers community. Those organizations located outside the service area are statewide organizations that also service the Punta Rassa area.

> Governor's Appointment, Member, International Language Institute Advisory Council, Tallahassee, Florida (1990).
>
> Member, "Dinamation" Board of Directors, Public Broadcasting System Educational Project (1990).
>
> Member, Board of Directors, Price Halfway House (1988-present).
>
> Chairman, Hispanic and Haitian Meeting on Housing and AIDS (1988).
>
> Assisted in production of two 30-minute video productions regarding migrant housing problem, Hispanic Council (1988).
>
> Member, Board of Directors, Florida Consortium on Multilingual/Multicultural Education (FCOMME) (1981-1990). FCOMME is a state institutional organization consisting of 52 organizations, including educational institutions.
>
> Organizational Chairman, FCOMME (1978-1981).

Chairman, Health Fair for Hispanics, Hispanic Council (1986).

Hispanic Voter Registration, Hispanic Council (1986-1988).

Served on Political Forum for Spanish/English Candidates, Hispanic Council (1985 and 1989).

Chairman, Hispanic Council of Southwest Florida, Families Survey of Needs - Salivar Camp, Johnson Camp, Train Depot Shopping Center, Farmworker Village, Fort Myers High School (1985).

Member, Board of Directors, Hispanic Council of Southwest Florida (1983).

Member, Florida State Bilingual Advisory Council (representatives for Fort Myers district) (1982).

Member, Task Force on establishing endorsement for the certification of Bilingual/ESL teachers (granted by the Florida State legislature in 1981 (1982).

Obtained proclamations from County Commission and City of Fort Myers for declarations regarding Hispanic Cultural Celebration (1982-1990).

Director, Second Lee County Leaders Seminar, Fort Myers Beach, Florida, Topic: "Reading and the Bilingual Child" (1981).

Panel Presenter, The Lau Remedies in Lee County, Title VII Management Conference, Washington, D.C. (1980).

Participant in Sound/Slide Production: *Our Children in a World of Differents* (1980).

Speaker before the Florida State Cabinet, Capital Building, Tallahassee, Florida, regarding Florida Consortium on Multilingual and Multicultural Education. Received proclamation of endorsement signed by the cabinet members and the Governor (1979).

Originator and Annual Chairman of first statewide leadership concerning foreign language and bilingual programs, Sanibel, Florida (1978).

Member, Board of Directors, Lee Mental Health Center (1976-present).

Member, Board of Directors, Florida Foreign Languages Association (1973-1982); President (1972).

Member, Board of Directors, Southern Conference on Language Teaching (1970-1974).

President, Florida Chapter, American Association of Teachers of Spanish and Portugese (1967). Johnson assisted in promoting and arranging competition for approximately 1,500 Spanish students from across the state. Tr. 269.

Speaker: Hispanic Chamber of Commerce (1990); Women in the Media and How It Can Help Community Programs, Naples Athletic Club (1989); District School Board Meetings, Topic: "Bilingual Education" (1980-1990); Zonta Club, Topic: "Bilingual Education" (1982); Sertoma Service Organization, Topic: "Bilingual Education" (1981); Kiwanis Club - East Side, Topic: "Bilingual Education" (1981); Kiwanis Club - Downtown, Topic: "Bilingual Education" (1980); Phi Delta Kappa, Topic: "Bilingual Education" (1980).

Judge: Little Miss Hendry County Contest (1987); Miss South Florida Contest (1989); Night of Stars (talent show to raise funds for the Abuse Counseling Center); Builders Parade of Homes, Port Charlotte, Florida (1989).

Curtain Call, Public Television Fundraiser (1987-1990) (Tr. 275).

Kight Ex. 3, pp. 4-6.

61. In her position as part-time Director of Community Affairs at Station WBBH-TV, Fort Myers, Florida, Johnson has been involved in the production of the following television programs:

Producer and anchor of "Twenty Book Club," a 30-minute videotape on reading which was distributed to six counties (1990). Johnson contacted the people she wanted to be involved with the Book Club and selected educators whom she believed were well qualified to speak on the subject of reading. She also assisted in writing the script. Tr. 276.

Producer of two weekly book reports by children in kindergarten through grade 12 aired each Saturday morning (1990-July 1991). Johnson selects the children, works with them on their writing, and selects the pictures for the visuals. During the production phase of the program, the production staff works under the direction of Johnson. Johnson estimates that she spends between 10-12 hours each week on the Book Club. Tr. 258-260.

Daily interviews: "Community News with Mary Johnson" (1986-1988).

"Learning in Two Languages" (15-minute sound/slide) (1980).

*The World Outside Our Skin* (30-minute educational documentary (1979). Johnson supervised the entire production of this program, including preparing the script and accompanying the cameraman to take the visuals. Tr. 280.

Anchor-Producer: *Gulf Coast Today* (30-minute daily program) (1973-1988).

Anchor of five-minute Spanish weekday newscast (1973-1986). Responsibilities included: (1) summarizing, translating, and presenting five minutes of news in Spanish, (2) presenting two daily television interviews, and (3) producing a line-up with visuals and timing the show.

Kight Ex. 3, p. 6.

62. Johnson is an Hispanic female. Kight Ex. 3, p. 2; Tr. 299.

**Diversification**

63. Kight Broadcasting has no ownership interest in or connection with any medium of mass communication. Kight Ex. 1. Similarly, Kight has no ownership interest in or connection with any broadcast station, cable system, newspaper, magazine, or other medium of mass communication. Kight Ex. 2, p. 2.

64. Johnson is presently employed on a part-time basis as Director of Community Affairs at Station WBBH-TV, Fort Myers, Florida. In the event Kight Broadcasting's application is granted, however, Johnson will terminate her employment with Station WBBH-TV prior to commencement of program tests. Johnson has no other ownership interest in or connection with any broadcast station, cable system, newspaper, magazine, or other medium of mass communication. Kight Ex. 3, p. 2.

**Auxiliary Power**

65. Kight Broadcasting will install auxiliary power facilities at both its studio and transmitter site to ensure continued operation in the event of a power outage. Kight Ex. 1.

**Palm Tree FM Limited Partnership -- Comparative Issue**

**Ownership Structure and Control**

66. Palm Tree is a limited partnership organized under Florida law. Palm Tree Ex. 1. Its certificate and agreement of limited partnership, dated February 29, 1988, was filed with the Florida Department of State on March 1, 1988. Palm Tree Ex. 5, pp. 2-3. Michelle L. Karas is identified as the sole General Partner.[11] The nominal Limited Partners are two brothers, Alan Landry and Christopher Kevin Landry (usually referred to as Kevin Landry (Tr. 358)). Alan Landry lives in the vicinity of New York City. Kevin Landry resides in Lincoln, Massachusetts. Palm Tree Ex. 1, p. 1.

67. Under the limited partnership agreement, Ms. Karas was obligated to provide an initial capital contribution of $1,800. The Limited Partners together were to provide an original capital contribution of $10,200 upon execution of the limited partnership agreement[12] and agreed to make further capital contributions in the aggregate amount of $40,000. Palm Tree Ex. 5, pp. 4-5.

68. In a supplementary affidavit filed with the State of Florida on August 28, 1988, Palm Tree stated that its partners had agreed that the initial capital contributions to the partnership shall be as follows:

| | |
|---|---|
| Michelle Karas | $ 1,800 |
| Alan S. Landry | $ 2,040 |
| Christopher K. Landry | $ 8,160 |
| TOTAL | $12,000 |

69. The limited partnership agreement specifies that no Limited Partner shall perform any services for the limited partnership materially relating to its radio station; become actively involved in the management or operation of the partnership's radio station; be an employee of the partnership's radio station; perform any services as an independent contractor or agent with respect to the partnership's radio station; or communicate with the General Partner on matters pertaining to the day-to-day operations of the business. Palm Tree Ex. 5, p. 9.

**Formation of Partnership**

70. Michelle Karas learned of the Punta Rassa allotment from her father, Stan Karas, in December of 1987. Tr. 353. It was "a couple of weeks later," sometime in January 1988, that she decided to become involved in an application for the Punta Rassa station. Tr. 354. After she made that decision, her father recommended she contact communications attorney Thomas Siebert. Mr. Karas and Siebert had known each other for a number of years. At one time, they were co-owners of Station WTEZ, Yorktown, Virginia. Siebert's firm, Besozzi & Gavin, also had represented Karas' other broadcast interests. At the time Ms. Karas contacted Siebert regarding the Punta Rassa station, Stan Karas and Siebert had other business dealings. Tr. 354, 356-357.

71. Ms. Karas testified that after discussing all other options with Siebert, "we decided" that a limited partnership would be "the best route." Ms. Karas testified: "We knew I couldn't be a sole proprietor, I don't have that type of funds, you know." Tr. 357.

72. Siebert suggested to Stan Karas that Alan Landry would be a suitable Limited Partner. Tr. 357. Alan Landry had known Siebert since the mid-1980s. By mid-1987, they had talked about FCC licensing opportunities in general. Tr. 1079-1080. As Alan Landry put it, "it was logical for Mr. Siebert to call me when the Punta Rassa opportunity went into the public realm . . . ." Tr. 1081. They first discussed an application for the Punta Rassa allotment in December 1987 or January 1988. Tr. 1080.[13] Alan Landry was also a client of Siebert's firm at the time. Tr. 358.

73. After the topic of an application had been raised, Stan Karas arranged a dinner meeting between Michelle Karas, Alan Landry, and himself. Also present was Alan Landry's girlfriend and Michelle Karas' boyfriend. Tr. 358, 1020-1021. The dinner meeting was on approximately January 23, 1988. Prior to that meeting, Michelle Karas had no contact whatsoever with Alan Landry. Tr. 358.

74. The structure of the applicant was not discussed at the dinner meeting. Tr. 359. Ms. Karas testified the purpose of the meeting was "just to get to know each other," to learn each other's background, to discuss Ms. Karas' views on the market and for Mr. Landry to see if he wanted to get involved with Ms. Karas "on something like this." Tr. 360. They did not discuss Ms. Karas' percentage of ownership, her financial contribution to the partnership, or how the station would be financed. Tr. 390, 1021-1022.

75. After the dinner meeting, Alan Landry prepared a five-page, handwritten memorandum regarding the proposed Punta Rassa station for his brother, Kevin. Kight Ex. 20; Tr. 1025-1026. Alan Landry described the document as an "overview summary" and "a bit of a sales pitch about the business opportunity in Punta Rassa." Tr. 1025-1026. In the memorandum, Alan Landry stated, *inter alia*.

> 1. Tom Siebert (FCC oriented attorney) and Stan Karas (radio management) are honest and experienced. . . .
>
> 2. Stan's daughter, Michelle, is credible and mature for a 24-year old/4 years experience in radio advertising sales (I have met her).

. . .

6. Construction.

Original application must demonstrate financial capacity to perform construction upon license approval.

Per Siebert, attached letter sets forth previously approved letter format.

Given your net worth, business acumen and bank contacts, I assume we could relatively easily establish such a commitment from a Boston bank or other.

7. Total Cash Requirements.

| | |
|---|---|
| Application and legal | $ 50-100M |
| Construction | $200-300M |
| Year one operating losses | $ 80-120M |
| | $330-520M |

Let's assume most of construction and operating losses would be financed with a bank loan.

8. Potential Upside:

(a) Even with disastrous year one operating results, "stick value" of Class A FM station in Punta Rassa serving Ft. Myers should be at least $1 MM [million], perhaps $1.5 MM [million].

(b) After two years of reasonable operating results, value may approach $2-2.5 MM [million].

Even assuming an all equity financing the potential upside is attractive.

Assuming $100 M/equity and $400 M/bank debt financing, the potential upside is dramatic.

Kight Ex. 20, pp. 1, 3-4. The memo further stated Michelle Karas would "have to be general partner with at least a 20% interest" and under the heading "Summary Thoughts," that "Siebert, Stan Karas and his daughter, Michelle, combine to form a highly qualified team to pursue this somewhat unusual opportunity." *Id.*, pp. 4-5.

76. According to Ms. Karas, Alan Landry decided a week or two after their dinner meeting to go ahead with the project. Tr. 360.

77. Most of Ms. Karas' dealings with Alan Landry at this time were through Besozzi & Gavin. Tr. 360. Alan Landry did not discuss with Ms. Karas her financial contribution or her percentage of the partnership. Rather, he discussed those matters with Siebert and Kevin Landry. Tr. 1022. Alan Landry also discussed with Siebert, not Ms. Karas, whether the applicant should be a partnership or a corporation. Tr. 1093. He acknowledged that Siebert was the person he dealt with on all matters related to the formation of the partnership and the terms of the limited partnership agreement. Tr. 1022.

78. The prospective Palm Tree partners conducted no extensive background check on each other. Michelle Karas never discussed Kevin Landry's background with him. Tr. 390. Indeed, she testified she had never met Kevin Landry and had spoken to him on the telephone only once. Tr. 417, 420.[14] The only discussion Michelle Karas had with Alan Landry regarding his background was during the January 1988 dinner meeting. Tr. 390. Alan Landry made no inquiry of any kind to any station where Ms. Karas had been employed. Tr. 1091. Ms. Karas never received nor requested any financial statement from either of the Landrys. Nor did she provide either of them her financial statement. Tr. 389.

79. Besozzi & Gavin prepared Palm Tree's limited partnership agreement. Tr. 360-361. The law firm presented Ms. Karas with an agreement under which she would have a 20% ownership interest. She accepted the agreement without any sort of counterproposal. Asked if she knew how the 20% figure was derived, she responded: "Not really. I thought it was a standard practice. I have no idea." Tr. 362. Nor did she know who selected the 20% figure. Tr. 362-363. Siebert also presented and she accepted without counterproposal the proposition that she would pay 15% of any additional capital contributions. Tr. 426-427.

80. Siebert came up with the name of the partnership. Ms. Karas testified: "After he asked me to come up with some names, which were not making any sense, I was up for any suggestions that could be offered at the time. So I finally decided I liked his name better than mine." Tr. 363. The name was registered with the State of Florida prior to the limited partnership agreement being drafted. C.T. Corporation performed that task. Ms. Karas did not instruct that organization to reserve the name and does not know who did. Tr. 363-364.

81. Ms. Karas was only sent one draft of the limited partnership agreement. She signed the draft without any changes. Tr. 364. She testified, however, she had a local law firm review the agreement to ensure that it complied with Florida statutes. Tr. 447.

82. In order to make her initial capital contribution of $1,800, Ms. Karas borrowed the money from her father. She subsequently paid back the funds. Tr. 365.

83. Although the limited partnership agreement states that the Limited Partners will provide additional capital contributions of only up to $40,000. Ms. Karas testified there has been no question since the inception of the partnership that the Limited Partners would continue to make whatever capital contributions deemed necessary. Tr. 425. Ms. Karas said that Alan Landry verbally committed himself and his brother to provide additional capital. Tr. 423, 426. This understanding regarding the Limited Partners' willingness to put in money in excess of the figure stated in the limited partnership agreement has not been reduced to writing. According to Ms. Karas, Alan Landry did not establish an upper limit as to the amount the Limited Partners would provide: "He said as much as necessary, so there was no set ceiling on it." Tr. 426.[15]

84. Ms. Karas testified she hired her father to prepare a financial study for the proposed station. The study, which generally was referred to during the hearing as a "*pro forma*," was to include cost estimates. Tr. 366; *see* Palm Tree Ex. 9.[16] After she received the *pro forma*, Ms. Karas sent a copy to Siebert who, in turn, sent it to Alan Landry. Tr. 368. Ms. Karas, however, did not discuss the *pro forma* in detail with either of the Landrys. Tr. 369. Ms. Karas played no role in preparing any of the estimates that appear in the *pro forma*. Tr. 369.

**Application Preparation and Prosecution**

85. *Selection of Engineer.* Siebert recommended and made arrangements to secure the services of Palm Tree's original consulting engineering firm, Satellite Systems Engineering, Inc. (SSE). Ms. Karas had no personal contact with anyone at that firm until February 29, 1988, the day the engineering section of Palm Tree's application was signed. Tr. 381-382.

86. *Transmitter Site.* Ms. Karas played no role in selecting Palm Tree's transmitter site or establishing the original terms under which the site was to be made available. Tr. 382-383. The transmitter site was located by Chad Daly of a firm identified as Telsa. SSE, not Ms. Karas, made arrangements with Telsa to locate the transmitter site. Ms. Karas was not advised that SSE was going to hire Telsa. Nor was she advised what fee Telsa or Daly would charge. She has never spoken to Daly. Tr. 382-384. Daly, in addition to locating a site, negotiated with the site owner and established the terms under which the site would be available to Palm Tree (*i.e.*, leased for the sum of $1,000 per month). Tr. 383, 409. Daly did not consult with Ms. Karas before agreeing to that figure. Tr. 409. At the time the application was filed, Palm Tree's proposed transmitter site was owned by David Herbott. Ms. Karas' single contact with Mr. Herbott was a telephone conversation on February 19, 1988. Tr. 412. In that conversation they did not discuss the terms under which the property was being made available. Tr. 413.

87. *Tower.* Palm Tree proposes a self-supporting (or "stand-alone") tower. Kight Ex. 19. Palm Tree's consulting engineer was the one who decided to specify a self-supporting tower. Tr. 385. Ms. Karas had no input into that decision. Tr. 387. Moreover, Ms. Karas played no role in estimating the cost of such a tower.[17] The *pro forma* included an estimate of $40,000 for a 350-foot tower "installed." Palm Tree Ex. 9, p. 16. But the *pro forma* also stated, in estimating the total equipment package, that $40,000 could be deducted if an existing tower is available. Palm Tree Ex. 9, p. 20. Ms. Karas acknowledged that at the time the *pro forma* was prepared, Palm Tree did not know whether it was going to use an existing tower, a self-supporting tower or a guyed tower. Tr. 387.

88. *Application Form.* The first time Ms. Karas saw the construction permit application form (FCC Form 301) for Palm Tree, it had already been typed and was ready for her signature. Tr. 388. She testified she found the organizations that were included in the Equal Employment Opportunity Program and "attempted" to write the programming statement. Palm Tree's communications counsel, however, "put it in writing." Tr. 388.

89. *Financial Certification.* With respect to Palm Tree's financial qualifications, which will be discussed in substantially greater detail below, Ms. Karas testified that Palm Tree's communications counsel instructed her that the applicant was not financially qualified. As Ms. Karas testified: "We had not obtained our bank letter at that time, so we were honest and said no, we were not financially qualified." Tr. 389. Ms. Karas claimed, however, she "knew," after "discussions with the Landrys" (although she only spoke with Alan Landry) and Tom Siebert, the Landrys would be qualified without a problem. Tr. 389.

90. Ms. Karas directed Alan Landry to obtain a bank letter for Palm Tree. She gave him that instruction on the same day that Palm Tree's limited partnership agreement was entered into, February 29, 1988. Tr. 391-392; *see* Palm Tree Ex. 5, pp. 1, 3. Ms. Karas personally made no attempt to obtain a bank loan letter nor did she take any other steps to permit Palm Tree to certify it was financially qualified. Tr. 394, 398-399. She did not provide any draft bank letter to Alan Landry or discuss with him what banks he would be approaching. Tr. 395. Ms. Karas' testimony makes clear that she anticipated that both Alan and Kevin Landry would be involved in obtaining the bank letter: ". . . I told Alan what we needed to have, and them being the Limited Partners, to go get it. I didn't care if it came from Alan's references or Kevin's. It was one of the Landrys." Tr. 396. It was clear, however, she was to have no role in obtaining the letter. Tr. 396.

91. An amendment affirmatively certifying to Palm Tree's financial qualifications was signed June 1, 1988 and filed June 3, 1988. That financial certification was based upon a letter dated May 5, 1988, from the Bank of New England. Tr. 789 (Ms. Karas); Tr. 1003-1004 (Alan Landry); *see* Palm Tree Ex. 10. Ms. Karas first learned the Bank of New England had been contacted only when she received the May 5 letter. At hearing she could not recall whether Alan Landry had ever indicated he had contacted more than one bank. Tr. 399. Ms. Karas had no contact with the Bank of New England either before or after the letter was issued. Tr. 400.

92. The bank's letter indicated its willingness to extend a line of credit was subject to various conditions, including that "all reasonable and ordinary credit criteria of Bank of New England are met" at certain times. Palm Tree Ex. 10, p. 1. Ms. Karas neither knew nor had inquired, as of the initial hearing in this proceeding, what those criteria were. Tr. 401. She did not know if the bank had approved any specific collateral in connection with the proposed loan or what documents, if any, were presented to the bank in connection with the proposed loan. She did not prepare any financial statement for the bank nor did she cause her resume to be forwarded to the bank. Tr. 401. She did not know if the bank had been provided any information about her. Tr. 402. And she does not know when the bank was initially approached regarding the proposed loan. Tr. 402.

93. *Limited Partners' Communications with Ms. Karas and Counsel.* Ms. Karas testified that she and Alan Landry had ten or possibly more telephone conversations between February 29, 1988 (the day when she instructed him to get the bank letter) and May 5, 1988 (the date of the bank letter). Tr. 403-404. Ms. Karas initiated these conversations. Tr. 406.[18] She is certain that the topic of obtaining the bank letter came up during these discussions. Tr. 404. Among other topics, Ms. Karas also discussed with Alan Landry the competing applications filed for the Punta Rassa allotment. Tr. 406-407.

94. Ms. Karas testified Alan Landry has had free reign to call Besozzi & Gavin regarding Palm Tree's affairs and, in fact, has done so. Tr. 417, 419-420. For his part, Alan Landry testified he has discussed matters related to the Punta Rassa project with Siebert 20 or 30 times. Tr. 1095-1096. Among the topics discussed have been the number of applicants, the relative merits of the applicants, "what's new" in the comparative hearing process, the United States Supreme Court's reaffirmation of the minority preference and the applicant's expenses. Tr. 1074, 1096-1097. With respect to those expenses, some time before the initial hearing sessions in this proceeding, Alan Landry requested and received copies of all of Palm Tree's bills for legal services. tr. 419.[19]

95. *Checking Account.* Palm Tree's limited partnership agreement provides that all funds belonging to the partnership are to be deposited into a checking or savings account in the name of the partnership. Palm Tree Ex. 5, 18 (¶ 10.1). No bank account for Palm Tree was established until December 1989 or January of 1990. Tr. 414. Prior to that time, Ms. Karas used her personal account to pay Palm Tree's bills. Tr. 415-416; *see* Tr. 354-365. The funds to pay those bills came from the Limited Partners and herself (including the initial capital contribution she borrowed from her father). Tr. 365. On cross-examination by the Presiding Judge, Ms. Karas indicated the opening of an account was delayed because no major funds were coming into the corporation plus, "I had to file and get the tax I.D. number and everything in line to open up the account." Tr. 448. She further testified that the bank informed her she needed a tax identification number before it would open an account for the limited partnership. Tr. 448. Ms. Karas acknowledged that the process of obtaining a tax identification number took a couple of weeks or a month and that she was not precluded from opening up the account in 1988. Tr. 450. Further examination revealed that Palm Tree, in fact, did *not* need a tax identification number to open the account. As Ms. Karas subsequently admitted, the account was opened under Ms. Karas' personal Social Security number. Kight Ex. 14; Tr. 450-451. The bank used her Social Security number because she told the bank that she had filed the proper papers to obtain a tax identification number and wanted to get the account open. Tr. 451.

**Integration**

96. Ms. Karas, a white female, proposes to work a minimum of 40 hours per week as General Manager of Palm Tree's proposed station. Upon a grant of Palm Tree's application, she will resign her current employment as Station Manager of WKZY-FM, La Belle, Florida. In her capacity as General Manager of the Punta Rassa station, Ms. Karas purportedly would be the principal executive and administrator of the station, ultimately responsible for the formulation and implementation of all station policies for programming, sales and personnel. Ms. Karas testified that all station department heads will report to her and that she will be responsible for development, implementation and oversight of Palm Tree's EEO program. Palm Tree Ex. 3, p. 1.

97. With respect to local residence, Ms. Karas has had the following addresses in the Fort Myers/Punta Rassa area.

| Residence Address | Dates |
|---|---|
| 2411 East Mall Drive<br>Apartment 208<br>Fort Myers, Florida | March 1984-Dec. 1984 |
| 903 Gleason Parkway<br>Apartment 103<br>Cape Coral, Florida | Jan. 1985-Feb. 1986 |
| 5027 S.W. Courtyards Court<br>Apartment 51<br>Cape Coral, Florida | Feb. 1986-Aug. 1987 |
| 4401 Evans Avenue<br>Apartment 103<br>Fort Myers, Florida | Aug. 1987-Sept. 1988 |
| 2737 Colonial Boulevard<br>Apartment 201<br>Fort Myers, Florida[20] | Sept. 1988-Oct. 1990 |
| 1629-22 Red Cedar Drive<br>Fort Myers, Florida | Nov. 1990-Present |

Palm Tree Ex. 15.

98. Engineering calculations introduced into evidence by both Kight Broadcasting and Palm Tree indicates that, using the methodology specified in the Commission's rules, 4401 Evans Avenue and 2737 Colonial Boulevard, are both situated beyond Palm Tree's 1.0 mV/m contour. Kight Ex. 15; Palm Tree Ex. 14, pp. 1-4. Thus, from August 1987 (*i.e.*, seven months before Palm Tree's application was filed) to November 1990 (*i.e.*, after the initial hearing session), she resided outside of the service area. The only period of service area residence cognizable for comparative purposes is from March 1984 to August 1987.

99. The civic activities of Ms. Karas for which Palm Tree is entitled to credit are as follows:

> In September 1990 (approximately one month before the initial hearing in this proceeding), she became a dues-paying member of the American Business Women Association in Fort Myers. She has served as the "emcee" of the local chapter's annual pageant. Palm Tree Ex. 3, p. 2; Tr. 351-352.
>
> In 1987 she assisted the American Cancer Society, Lee County (Fort Myers) unit with its "Bid for Bachelors" fundraising event, which encompassed approximately one month of her time. Palm Tree Ex. 3, p. 2.
>
> Also in 1987, she assisted the American Cancer Society with its "First Great Florida Duck Race," for which she donated approximately one month of her personal time to help organize the event, sell sponsorships and obtain donations. *Id.*
>
> From 1986 until 1987, Ms. Karas was a member of the Vestry of St. Hillary's Episcopal Church, Fort Myers. *Id.*; Tr. 344.

100. Palm Tree claims the following broadcast experience for Ms. Karas.

| Stations/ Location | Position | Dates |
|---|---|---|
| WRCC(FM),<br>Cape Coral, FL | Account<br>Executive | April 1984-<br>Dec. 1985 |
| WCVU-FM, Fort<br>Myers/Maples | Executive<br>Account | March 1986-<br>Aug. 1986 |
| WKZY(AM)/WIKX-FM,<br>Fort Myers, FL | Sales Manager/<br>Account Executive | Aug. 1986-<br>June 1987 |
| WQEZ,<br>Fort Myers, FL | Account<br>Executive | June 1987-<br>Dec. 1987 |
| WAVV,<br>Fort Myers, FL | Account<br>Executive | Dec. 1987-<br>March 1988 |

| | | |
|---|---|---|
| WIXI, Fort Myers, FL | Account Executive | April 1988 Nov. 1988 |
| WKZY(FM),[21] La Belle, FL | Previously Sales Manager; Currently Station Manager | 1988-Present |

Palm Tree Ex. 3, pp. 2-3.

**Diversification**

101. Neither Palm tree nor any of its partners have any ownership interest in any medium of mass communications. Ms. Karas, as previously noted, is Station Manager of WKZY(FM), La Belle, Florida, but made a timely pledge to terminate her employment with that station in the event Palm Tree's application is granted. Kevin Landry is a Limited Partner in the managing General Partner of T.A. Communications, a venture capital firm. T.A. Communications has various debt and equity instruments in mass media. Mr. Landry, however, has no role in the management of T.A. Communications. Palm Tree Ex. 2.

**Auxiliary Power**

102. Palm Tree claims comparative credit on the basis of its proposal to install auxiliary power facilities at both its studio and transmitter sites. Palm Tree Ex. 4, p. 1. No reference to auxiliary power equipment, however, is made in the detailed cost estimates prepared for Palm Tree by Stan Karas. *See* Palm Tree Ex. 9; Tr. 370.

**Palm Tree Financial and Misrepresentation/Lack of Candor Issues**

**Cost Estimates**

103. As discussed previously (¶¶ 84, 87, *supra)*, prior to the filing of Palm Tree's application, Stan Karas prepared a "pro forma" study which included estimates of the costs of construction and operation of Palm Tree's proposed station. Michelle Karas testified that Thomas Siebert, Palm Tree's communications counsel, had explained that such a document was necessary. Under a cover letter dated February 18, 1988, Mr. Karas forwarded the study to Ms. Karas. Palm Tree Ex. 8, pp. 1-2; *see* Palm Tree Ex. 9.

104. In the *pro forma*, the total cost of equipment, not including furniture, is listed as $214,266. Palm Tree Ex. 9, p. 20. Palm Tree claims that figure is an error and that the actual figure on that page should have been $147,232. Tr. 753-754. Stan Karas, who prepared the study, also testified the figure of $214,266 was wrong. Tr. 828. But Mr. Karas testified the correct figure is $161,962 (a figure which also appears at Palm Tree Ex. 9, 24 under the heading "Construction Costs"). Tr. 828; *see* Kight Ex. 21.

105. At one point in the *pro forma*, monthly operating expenses are estimated to be $28,164 (*i.e.*, $84,492 for three months, without consideration of any pre-operational expenses). Palm Tree Ex. 9, p. 21. At another point in the study, however, the first three months operating costs were estimated to be $72,653. Palm Tree Ex. 9, p. 24. In explaining the difference, Mr. Karas testified that he deducted $6,081 per month in expenses from the figure of $28,164. Certain of those deducted expenses were reflected elsewhere in the construction estimates appearing at Palm Tree Ex. 9, p. 21 (*i.e.*, a contract engineer at $800 per month and payroll taxes of $2,131 per month). Other expenses were simply eliminated on the basis of Mr Karas' understanding that they were not necessary in determining an applicant's budget for purposes of FCC financial qualifications. Among those expenses eliminated was $1,000 per month for telephone service. Kight Ex. 21, p. 2; Tr. 831, 834-835.

106. Ms. Karas' written testimony indicates Palm Tree originally used, from the *pro forma*, the figure of $234,615 as the total cost to construct the Punta Rassa station and operate it for three months without revenue. Palm Tree Ex. 8, p. 2; *see* Palm Tree Ex. 9, p. 24. Ms. Karas' testimony also notes the *pro forma* stated costs could vary 10% to 20%. Based on the material contained in the *pro forma* and her "general knowledge of staffing needs," Ms. Karas claims originally to have estimated that Palm Tree's costs of construction and operation for three months without revenue was approximately $200,000 to $220,000. Palm Tree Ex. 8, p. 2. After extensive cross-examination, Ms. Karas acknowledged that Palm Tree's original estimates came to approximately $223,000. Tr. 779.

107. Through cross-examination of Ms. Karas, Palm Tree's current estimates for construction and three months of operation of the proposed station emerged:

**Construction Costs**

| | |
|---|---|
| Transmitter and Related Equipment | $ 34,770 |
| Tower | $100,000 |
| Master Control Equipment | $ 13,797 |
| Production Room Equipment | $ 18,659 |
| STL and Remote Control Equipment | $ 30,006 |
| Satellite Equipment | $ 10,000 |
| Studio Rent | $ 10,000 |
| Installation | $ 10,000 |
| **SUBTOTAL** | **$227,232**[22] |

**Three Months Operating Costs**

| **Staff** | |
|---|---|
| General Manager ($2,000/month) | $ 6,000 |
| Operations Manager ($1,350/month) | $ 4,000 |
| Announcer ($1,200/month) | $ 3,600 |
| Receptionist ($1,000/month) | $ 3,000 |
| Office Manager ($1,000/month) | $ 3,000 |
| Two Sales Persons ($1,050/month each) | $ 6,300 |
| Contract Engineer ($800/month) | $ 2,400 |
| Payroll Tax | $ 4,250 |
| **SUBTOTAL** | **$ 32,600** [23] |

| Other | |
|---|---|
| Programming | $ 3,450 |
| Electricity | $ 1,800 |
| Tower Rent | $ 2,100 |
| Studio Rent | $ 2,700 |
| Advertising | $ 7,500 |
| Music Licenses | $ 1,500 |
| Supplies | $ 1,800 |
| **SUBTOTAL** | **$ 23,550**[24] |
| **Transmitter Site** | **$245,000** |
| **TOTAL** | **$528,382**[25] |

108. Although Ms. Karas identified a telephone as a necessity, she was unsure whether the above estimates included allowances for telephone expenses. Tr. 770-772. As discussed previously, no provision was made in the final budget, as prepared by Mr. Karas, for telephone expenses.

109. More importantly, the estimates do not include any provision for repayment of a loan. Ms. Karas never asked her father whether the estimates made any provision for such repayment. Tr. 775-776.[26] Ms. Karas did not know what the monthly payments on the bank loan would be. Tr. 776.

110. Palm Tree's past and present cost estimates regarding its proposed tower and transmitter site require further discussion.

111. *Tower Estimate*. From the initial filing of its application, Palm Tree has specified a self-supporting tower with an overall height of 108 meters (354.24 feet) above ground level. Kight Ex. 19; Tr. 840. The *pro forma* includes an estimate of $40,000 for a 350-foot tower "installed." The *pro forma*, however, does not explicitly indicate whether that estimate is for a guyed or a self-supporting tower. *See* Palm Tree Ex. 9, p. 16. Ms. Karas said she first learned that a self-supporting tower was proposed when Palm Tree's application was filed. Tr. 756-757. She assumed "all towers and things cost the same," and so therefore assumed the estimate prepared by her father was "right on the money." Tr. 757. She did not ask her father where he obtained that figure. Tr. 755.

112. Ms. Karas testified that Palm Tree now estimates that construction of the proposed self-supporting tower will cost $100,000, rather than $40,000. Tr. 755. That estimate was relayed to her by Palm Tree's counsel from Robert Bednarek, who is Palm Tree's present consulting engineer. Tr. 747. She testified that she received that estimate the week prior to the December 3, 1990, hearing session (pertaining to Palm Tree's financial qualifications). Tr. 747-748. At the December 3 hearing, Ms. Karas testified that she had not previously made any efforts to obtain a cost estimate for her tower. Tr. 748. As she testified: "I didn't think I would need to until, you know, if awarded the license and purchasing equipment and then I would know the true cost." Tr. 758. She also testified that no one else on behalf of Palm Tree had made any attempt to obtain an updated or different cost estimate for the tower until the week prior to the December 3 hearing. Tr. 747-748.

113. At the December 3 hearing, Ms. Karas specifically was asked: "Did you ever inquire of counsel whether your cost estimate of $40,000 was adequate to construct a self-supporting tower prior to this conversation a week or so ago?" She responded: "No. I did not." Tr. 759. That answer directly conflicts with Ms. Karas' testimony given October 22, 1990, during the initial hearing sessions in this proceeding. At that time, she was asked: "Did you confer with anyone what the cost of a self-supporting tower would be?" She answered: "After looking at my *pro forma*, I called up the law firm to see if that was normal. I was checking -- even though my father had done it. And so yes, I did question if that was what normal costs were for a self-supporting tower." Tr. 385-386.

114. Stan Karas testified that the $40,000 estimate was part of a standard package of estimates he used in 1988. The figure was for a guyed tower. He has never developed an estimate for a 350-foot self-supporting tower. Tr. 823-824. Mr. Karas volunteered, however, that self-supporting towers are "very expensive." Tr. 823. Mr. Karas was not aware that Palm Tree was proposing a self-supporting tower until his deposition was taken shortly before the December 3, 1990, hearing session. Tr. 825-826.

115. *Tower Site*. As discussed above, Palm Tree originally proposed leasing its transmitter site at $1,000 per month. *See* ¶ 86, *supra*.[27] Ms. Karas testified that, upon the filing of a petition to enlarge against Palm Tree by former applicant Patrick Broadcast Associates, Inc. (Patrick), she learned that Palm Tree's transmitter site was no longer available for lease, but only for purchase.[28] Palm Tree Ex. 8, p. 3. Subsequently, Ms. Karas received a letter dated May 30, 1990, from Alice McBrayer, a broker with Lighthouse Realty of Pine Island, Inc. Ms. McBrayer was the agent for Robert and Betty Kleinschmidt, the present owners of the property specified as Palm Tree's transmitter site. The letter indicated the property was currently listed for $650,000. The letter made no reference to any deferred payment terms. Palm Tree Ex. 11, p. 1. In her written testimony, Ms. Karas states that in consultation with communications counsel she "recalculated the cost estimate for Palm Tree if the transmitter site were to be purchased rather than leased." Palm Tree Ex. 8, p. 3. She further stated:

> In determining a purchase price for the transmitter site, I accounted for the fact that although the property was currently listed for $650,000, it had been sold in January 1984 for $170,000, and in July 1988, it had sold for only $180,000, a $10,000 gain in more than four years. Thus, I recalculated a price to purchase the property of approximately $200,000 [sic].

*Id.* Nothing in the record indicates that the Kleinschmidts were ever willing to accept a purchase price of $200,000. Palm Tree Ex. 8, p. 4.

116. As of November 15, 1990, the estimated fair market value of the Kleinschmidt property was $245,000. Tr. 744 (stipulation). Nothing in the record indicates the Kleinschmidts would accept an offer of $245,000. The Kleinschmidts' current asking price is $550,000. Palm Tree Ex. 8, p. 4.

**Reliance Upon Bank of New England Letter**

117. As discussed above (¶ 90, *supra*), on the day Palm Tree's limited partnership was created, Ms. Karas asked Alan Landry to obtain a letter from a financial institution to cover the costs of construction and operation of the station. At the time Palm Tree originally filed its application, it answered the financial certification question in the negative. Tr. 389. Subsequently, Palm Tree received the following letter from the Bank of New England:

> May 5, 1988
>
> ATTN: Michelle Karas, General Partner
>
> Christopher K. Landry, Limited Partner
>
> Alan S. Landry, Limited Partner
>
> 4401 Evans Avenue
>
> Apt. 103
>
> Ft. Myers, FL 33901
>
> Dear Partners:
>
> We understand that you are applying to the Federal Communications Commission for a construction permit for FM Ch. 249A to serve Punta Rassa, FL and environs.
>
> The purpose of this letter is to advise you that, subject to the qualifications stated below, Bank of New England is willing to extend to you, a line of credit up to $400,000 to cover equipment costs and working capital requirements, provided the following conditions are met:
>
> 1. You are successful in obtaining approval from the Federal Communications Commission to construct and operate your proposed FM station in Punta Rassa, FL.
>
> 2. All reasonable and ordinary credit criteria of Bank of New England are met at such time as you (a) receive the construction permit; (b) request a formal lending commitment from Bank of New England, and (c) execute all customary documentation normally required by the Bank.
>
> While the pricing and terms of the amortization of the loan commitment will be contingent upon the exact credit conditions prevailing at the time the loan is extended, we anticipate calculating interest at Bank of New England's base rate plus additional points as determined from month to month. Our Bank's current base rate is 8.50% (prime lending rate). Any loan made will be repaid in 60 installments or as otherwise reasonable in line with financial projections received prior to the time of borrowing.
>
> If the loan were to be collateralized with the assets of the permittee for the Punta Rassa FM station, our loan documents would comply with all requirements of the Federal Communications Commission, including the provision of a minimum of ten (10) days prior written notification to you and to the Federal Communications Commission before any equipment will be repossessed under any default clause of the loan agreement.
>
> We look forward to working with you in connection with this venture.
>
> Sincerely,
>
> Allyn C. Woodward, Jr.
>
> Senior Vice President.

Palm Tree Ex. 10, p. 1. Kevin Landry, Alan Landry and Allyn C. Woodward each testified regarding the circumstances leading to the creation of the Bank of New England letter.

118. *Kevin Landry*. Kevin Landry took the first step in obtaining the May 5, 1988, letter from the Bank of New England. Specifically, he made a single telephone call to Woodward, who was at the time a vice president of the bank. Tr. 1042-1043. The telephone conversation was about ten minutes long. Tr. 1052. Kevin Landry testified he could not recall the exact date of the call, stating only that it was "[s]ometime between February and May." Tr. 1045. When asked what, to the best of his recollection, he told Woodward during the conversation, he testified:

> I told him that my brother and I were investors in a new company to apply for an FCC license. I'm sure that I repeated the essence of the investment, reiterating that he understood the value of an FCC license, that we had a very good manager, who knew the market and came up on the sales side, which, I think, is critical to getting a new radio station off the ground, and that Punta Rassa was in a growth area of the country. I think that's the essence of making a good investment in this business. I'm sure that's what I communicated to him.

Tr. 1046. According to Kevin Landry, Woodward agreed in that conversation to provide a letter. They did not discuss, however, the specific terms of the letter nor did they discuss collateral or whether Kevin Landry would provide his personal guarantee. Tr. 1046-1047.[29]

119. Asked if they discussed a dollar amount for the proposed letter, Landry responded, "I believe we did, but I don't recollect all of the details of that conversation." Similarly, he did not recollect whether they discussed a repayment period. Tr. 1052. The May 5, 1988, letter states the bank anticipates calculating interest at its base rate plus additional points as determined from month to month. *See* Palm Tree Ex. 10. What those additional points might be was not discussed by Woodward and Kevin Landry. Tr. 1052.

120. Kevin Landry did not provide his personal financial statement to Woodward in connection with the issuance of the May 5, 1988, letter. Tr. 1052. Indeed, he did not know whether he provided any documents to Woodward in connection with issuance of the letter. Tr. 1043. He recalled no subsequent conversation with Woodward prior to the issuance of the bank's letter. Tr. 1053.

121. Kevin Landry testified he had a relationship with the Bank of New England that dates back "probably to 1970" and had known Woodward for 10-15 years. Tr. 1043-1044. He testified that he has worked closely on situations in which his firm, T.A. Associates,[30] was an equity investor and the Bank of New England was a lender. Tr. 1044. Occasionally, T.A. Associates has invested with the Bank of New England's small business investment company. Tr. 1044.

122. Kevin Landry did not usually discuss his personal investments with Woodward. *Id.* The Bank of New England is not Kevin Landry's personal bank. Tr. 1056. In connection with other transactions, he had provided the Bank of New England his personal financial statement in 1983 and 1985. Tr. 1063.[31] He has not personally borrowed money from the bank in the past but did "contingently" guarantee a loan to a company called Mishoba Cablevision. Tr. 1056-1058. Kevin Landry volunteered that his investment in Mishoba Cablevision is not "terribly important in my life and I don't pay a lot of attention to it." Tr. 1058.[32]

123. At hearing, Palm Tree proffered a financial statement for Kevin Landry dated December 2, 1990. The proffer was rejected. Landry, however, was permitted to testify that his net worth in 1988 was approximately $8 million, including liquid assets in the neighborhood of $5-6 million. Tr. 1058-1059. He, however, had never given a financial statement to Ms. Karas or to Thomas Siebert in connection with Palm Tree's application. Tr. 1060.

124. *Alan Landry.* Alan Landry called Woodward at the Bank of New England after Kevin Landry had made an initial contact with the banker. *See* ¶ 118, *supra.* Alan Landry's call to Woodward occurred several weeks prior to the issuance of the letter on May 5, 1988. Tr. 1005-1006. Although he does not know the specific date of the call, Alan Landry testified it could have been within the first two weeks of April or in late March. The conversation was approximately five minutes in length. Tr. 1069-1070. The purpose of the conversation was to confirm "that my brother had forewarned him, . . . that I would be calling, and just to reconfirm and introduce him to the topic at hand, which was a radio licensing opportunity that involved pursuing a financial commitment." Tr. 1070. The conversation did not entail a discussion of the terms of the proposed loan, the interest rate, the repayment schedule or, to Alan Landry's recollection, discussion of any collateral. Tr. 1070. With respect to the topic of collateral, he offers only that he "may have in passing sort of suggested within reason that we'd be willing to provide guarantees and/or collateral as he saw fit or willing to discuss that topic [sic]." Tr. 1070. He did not, however, have a clear recollection of any such discussion. Nor did he recall discussing Michelle Karas with Woodward. Tr. 1071.

125. Alan Landry testified that he recalled thereafter sending Woodward a copy of the *pro forma* prepared by Stan Karas. Tr. 1008, 1071. Landry testified that the *pro forma* was accompanied by his cover memo. He said he previously had come across a copy of that memo in his files, but has been unable to locate it again. Tr. 1008-1009. He did not provide his or Ms. Karas' personal financial statement to the Bank of New England.

126. Alan Landry's next action was to send a draft bank letter to Woodward. The draft, sent on April 25, 1988 via Federal Express, was attached to a handwritten, undated note to Woodward. Palm Tree Ex. 17; Tr. 1066. The draft bank letter was, in fact, a photocopy of the letter dated January 21, 1988 from Bank One of Milford, Ohio to Crosswinds Limited Partnership, an applicant for an FM station at Louisville, Kentucky. Handwritten alterations in the letter were made to reflect Palm Tree's name, the frequency Palm Tree was seeking and the fact Punta Rassa (rather than Louisville) was the community of question. Also stricken were the name of the bank, the interest rate and the signatory of the letter. The dollar amount stated in Crosswind's Bank One letter ($400,000) was unchanged. Palm Tree Ex. 17, p. 3. Alan Landry received the Crosswind's letter from Mr. Siebert. Tr. 1008.

127. Alan Landry testified the only other contact he had with Woodward prior to the issuance of the letter was possibly a brief telephone call to alert Woodward that the draft bank letter was being sent via Federal Express. Tr. 1010, 1069. Alan Landry did not discuss the terms of the draft letter with Woodward. Tr. 1010.

128. *Allyn Woodward.*[33] Woodward was employed at the Bank of New England from 1963 until April 1990. Palm Tree Ex. 16, pp. 6, 24. In late 1987 and early 1988, he was a senior vice president of the bank and the head of its technology lending group. The technology lending group did not deal with broadcast lending. A separate division of the bank dealt with broadcast lending. *Id.*, pp. 6-7. As of late 1987 through mid-1988, Woodward was not involved in any lending with respect to broadcast or communications properties. *Id.*, p. 8. Woodward testified that, because broadcasting lending was not an area he was concerned with, he did not know whether the bank extended loans to start-up broadcast stations. *Id.*, pp. 8-9.

129. Woodward had dealt with Kevin Landry for a period of 10 to 15 years in Landry's role as head of T.A. Associates, which was well known in the area. *Id.*, pp. 9-11. To Woodward's knowledge the Bank of New England had not extended a loan to Kevin Landry personally. Woodward did not have and had never seen a personal balance sheet for Kevin Landry. *Id.*, pp. 10-11. He did not recall having available to him a balance sheet or similar financial statement for T.A. Associates. *Id.*, p. 11.

130. With respect to the May 5, 1988, letter from the Bank of New England, Woodward testified that Kevin Landry called and asked whether the bank would be willing to make a loan to Palm Tree. Woodward testified he said the bank would be willing to make a loan if Kevin Landry was willing to "stand behind it." By "stand behind it," Woodward meant "[g]uarantee it, collateralize it, do something which would be satisfactory." *Id.*, p. 12. Woodward could not recall any other substance of the conversation. *Id.*, p. 13.

131. More specific, Woodward has no recollection of any discussion of Michelle Karas or the costs associated with constructing and operating the proposed station. *Id.* He does not recall being provided with documents of any sort regarding the proposed station. *Id.*, pp. 14-15. Nor did he recall being contacted by anyone else regarding the proposed Palm Tree station between the time Kevin Landry initially called and the issuance of the May 5, 1988 letter. He did remember being contacted by Alan Landry, but did not recall when that contact was made or if Alan Landry provided him any documents regarding the proposed Punta Rassa station. *Id.*[34]

132. He guessed his telephone conversation with Landry was 10-15 mintues in length, but could have been less than 10 minutes. He does not have any records of when the conversation occurred. *Id.*, pp. 12-13.

133. Woodward testified that, other than the telephone conversation he received from Kevin Landry, he could not tell of any other action taken or information brought to his attention that led to issuance of the May 5, 1988, letter. He did not review the proposed loan described in that letter with anyone else at the bank of New England. *Id.*, 16-18. He does not recall who drafted the proposed letter. He acknowledged that the draft bank letter that is part of Palm Tree Ex. 17 is quite similar to his May 5, 1988, letter. But he did not recall getting the draft letter. *Id.*, p. 17.

134. Asked if he would have required the presentation of a business plan prior to extending credit, Woodward responded that it would "depend upon the terms and conditions that Kevin [Landry] was suggesting that we adhere to and so it was really dependent upon future events as the letter indicated." *Id.*, p. 20. Asked what were some of those future events, he stated that he had "no idea" but added that "we in the final analysis would have lent Kevin, if he stood behind it, $400,000 on terms I'm sure we would have mutually agreed to." *Id.* However, at the time the May 5, 1988, letter was issued, those terms had not been agreed to. *Id.* Woodward testified the loan would have required Kevin Landry's personal guarantee, but not the personal guarantee of anyone else. *Id.*, pp. 20-21. No reference to a personal guarantee by Kevin Landry appears in the bank's letter. *See* Palm Tree Ex. 10.

135. Woodward did not have any knowledge as to what it costs to construct and operate a radio station. Nor did he take any steps to determine whether the $400,000 amount specified in the May 5, 1988, letter was an appropriate or adequate amount. *Id.*, p. 25. Prior to leaving his employment with the Bank of New England in April 1990, Woodward was not advised of any change in the estimates for construction of the proposed Punta Rassa station. *Id.*, p. 24.

136. Other than his brief conversation with Kevin Landry and another brief conversation with Alan Landry, no one contacted Woodward or provided him with any information with respect to the Punta Rassa station (with the exception of a call from Palm Tree counsel Stephen Gavin within the 30-day period prior to Woodward's deposition). *Id.*, pp. 24-25.

137. Woodward had no knowledge as to whether the Bank of New England had on file personal financial statements, balance sheets or net worth statements for the partners of T.A. Associates. *Id.*, p. 26. Woodward stated that, in connection with the May 5, 1988, letter, he did not need a personal financial statement for Kevin Landry to make a credit decision. *Id.*, pp. 26-27. Woodward testified that he was generally aware of what venture capitalists earned and he characterized Kevin Landry as the leader of one of the largest venture capital firms in the country. As a result, Woodward made some assumptions as to what Kevin Landry earned and came to the conclusion that, since Landry had been in his position for many years, he had "accumulated a sufficient amount of net worth that would support a credit decision I would make." *Id.*, pp. 28-29.

**Representations Regarding Financial Cushion**

138. On August 22, 1990, Kight Broadcasting filed a petition to enlarge issues against Palm Tree seeking specification of financial and financial misrepresentation issues. Palm Tree filed an opposition on September 24, 1990.[35] Kight Broadcasting's motion was based, in part, upon the fact that Palm Tree's transmitter site was no longer available for lease at $1,000 per month, but instead was only for sale at a price of $650,000. Kight Broadcasting argued, *inter alia*, that a material question existed as to whether the 1988 letter from the Bank of New England letter provided a cushion sufficient to cover Palm Tree's substantially increased costs. *See* Tr. 592-593.

139. Attached to Palm Tree's opposition was a declaration signed by Michelle Karas on September 24, 1990. Kight Ex. 17. In that declaration, Ms. Karas stated that the Bank of New England letter "provides a cushion of several hundred thousand dollars over Palm Tree's original cost estimate." *Id.*, p. 2. Significantly, Palm Tree's opposition did not reveal the dollar amount of the Bank of New England letter. Only after specification of financial issues against it did Palm Tree reveal that amount -- $400,000. *See* Palm Tree Ex. 10.

140. As discussed at ¶ 106, *supra*, Ms. Karas' written hearing testimony states that Palm Tree's original cost study estimated the total cost to construct the Punta Rassa station and operate it for three months without revenue to be $234,615. Ms. Karas claims to have adjusted that figure downward to approximately $200,000 to $220,000. Palm Tree Ex. 8, p. 2. Ms. Karas' cross-examination at hearing, however, indicated that the estimated cost of construction and operation for three months originally was $223,000. Tr. 779.[36] Thus, assuming, *arguendo*, that the Bank of New England letter could be relied upon at all, it provided a cushion of only $177,000 over Palm Tree's original cost estimates, not "several hundred thousand dollars" as Ms. Karas claimed in the September 24 declaration proffered in hopes of avoiding specification of an issue.

141. In her September 24 declaration, Ms. Karas indicated that, in consultation with communications counsel, she determined a purchase price for the transmitter site based on previous sales of the property in question. She also recites that she spoke with the listing realty office and learned that the asking price for the proposed transmitter site had been reduced to $550,000 from the previous asking price of $650,000. Kight Ex. 17, pp. 2-3. Ms. Karas then stated: "Based upon the recalculated estimate, as well as the large cushion provided by the Bank of New England line of credit, I concluded that Palm Tree's financial certification had not been effected and that Palm Tree remained financially qualified." *Id.*, p. 3. Ms. Karas' declaration did not reveal the dollar amount of her "recalculated" estimate for the property or that the asking price for the property substantially exceeded the amount stated in the Bank of New England letter.

142. Ms. Karas testified at hearing that she looked at the situation as one in which she could put a downpayment of up to the amount of the cushion available from the Bank of New England loan and "amortize the rest of the loan like a car payment. Tr. 794.[37] Ms. Karas described the proposed transaction as follows: "Well, you put down a nice little downstroke of probably $100,000 and amortize the loan, like I said earlier, like a car payment. I'm not about to purchase land outright the way costs fluctuate." Tr. 806.[38] Ms. Karas testified that this was how she has always thought of doing it since "day one" but ac-

knowledged that she never "put it in writing." Tr. 807. Indeed, nothing in Ms. Karas' written testimony with respect to the financial issue reflects such a plan. *See* Palm Tree Ex. 8.

143. Ms. Karas acknowledged that no one ever advised her it was proper to include only a downpayment in her cost estimates and not the whole purchase price. Nor did she ask anybody whether such a procedure was proper. Tr. 807.

**Continued Reliance on Bank of New England Letter**

144. In Ms. Karas' written testimony regarding the financial issue, she stated Palm Tree was in the process of obtaining a new financial commitment letter. Palm Tree Ex. 8, p. 4. During the December 3, 1990, hearing session, Ms. Karas testified that it was decided in October 1990, following the initial hearing sessions, that Palm Tree would obtain a new bank letter through Allyn Woodward. Tr. 782. Woodward, as of that time, was no longer associated with the Bank of New England. Palm Tree Ex. 16, p. 24. Ms. Karas, as of the December hearing session, did not know with which bank Woodward was associated. Tr. 783, 792. Ms. Karas was "pretty sure" that Alan Landry and Kevin Landry had spoken to Woodward within the two weeks before the December 3, 1990, hearing session. The purpose of the conversation was to secure a new bank letter. Tr. 781-782. According to Ms. Karas, the amount of the loan requested of Woodward was $600,000. Tr. 785-786. But as of the December 3 hearing session, they had not obtained such a letter. Tr. 783. Indeed, Palm Tree's counsel stipulated that it was not going to offer other bank letters into evidence. Tr. 786-787. Notwithstanding her written testimony that Palm Tree was in the process of obtaining a new financial commitment letter, Ms. Karas testified on the witness stand that Palm Tree presently is relying upon the May 5, 1988, Bank of New England letter and Kevin Landry. Tr. 789. The Presiding Judge ruled that any reliance upon funds coming from Kevin Landry or Alan Landry would not be allowed since (a) such a proposal constituted a variance from Palm Tree's hearing exhibits as exchanged; (b) although the proposal constituted a fundamental change in Palm Tree's financial proposal, no amendment had been filed; and (c) the other parties were not given notice of any such proposal until the day Ms. Karas testified. Tr. 1016; *see* Tr. 1011-1017.

145. With respect to Palm Tree's continued reliance on the Bank of New England letter, Ms. Karas testified that within two to three weeks prior to the December 3, 1990, hearing session, she had been advised through Alan Landry and Palm Tree's counsel that the bank "stood behind" the letter. Tr. 796. Ms. Karas, however never personally has contacted the Bank of New England. Tr. 781, 791.

146. Although Palm Tree purportedly still relies upon the Bank of New England's May 5, 1988, letter, Ms. Karas exhibited a lack of knowledge as to the terms under which the loan would be available. Specifically, although the letter indicates the interest rate would be calculated on the bank's base rate plus additional points determined from month to month, Ms. Karas did not know how many additional points the bank might require. Tr 776-777. Furthermore, although the bank's letter requires the lender to satisfy the bank's "reasonable and ordinary credit criteria," Ms. Karas was unfamiliar with those criteria and had never inquired what they were. Moreover, she did not know if the bank had investigated whether Palm Tree was qualified under those criteria. Tr. 800.

147. For his part, Kevin Landry testified that as far as he knew, the Bank of New England letter was "still in place." He testified: "No one has told me that it's not, although, certainly the situation of the Bank of New England has changed dramatically in the last year because of their own difficulties." Tr. 1048. He was aware that the Bank of New England had lost a great deal of money in the previous year and had "a lot of problems." Tr. 1064.

148. To support its assertion that it could continue to rely upon the Bank of New England letter, Palm Tree introduced into evidence the deposition testimony of Dale C. Edmunds, a vice president of the bank.[39]

149. Edmunds appeared for deposition on November 20, 1990, pursuant to a subpoena duces tecum which called upon him to bring certain categories of documents with him to the deposition. In connection with that requirement, Edmunds made a review of the files within his possession, custody and control, but did not find any documents pertaining to Palm Tree or the proposed loan. Palm Tree Ex. 19, pp. 4-5. In fact, Edmunds could not locate within the bank's files a copy of the May 5, 1988, letter upon which Palm Tree relies. *Id.*, p. 5. Edmunds testified he called the bank's credit department which handles all of the credit files for the bank and was informed there was no file for Palm Tree or Kevin Landry. Edmunds also called Woodward to see if he knew of the location of any files related to Palm tree or Kevin Landry but Woodward told him he did not know of any. *Id.*

150. Edmunds said he did not have any knowledge whatsoever of the circumstances leading to the issuance of the May 5, 1988 letter. *Id.*, p. 16.

151. Edmunds does not know Kevin Landry, Alan Landry or Michelle Karas and has not communicated with any of those individuals regarding the May 5, 1988. *Id.*, pp. 13-14.

152. Edmunds has been employed by the Bank of New England for five years. As of his deposition, he managed the high technology lending group. He assumed that position in May 1990, replacing Woodward. *Id.*, p. 7. In his role at the bank, Edmunds typically would not be involved in a loan to a broadcast station. The bank does have a communications group, which lends funds to broadcasting companies. *Id.*, p. 8.

153. As of his deposition, Edmunds had reviewed the May 5, 1988, letter. *Id.*, pp. 8-9. Edmunds said that he does not see letters such as that and does not do that type of lending. He would not issue such a letter to a customer of the high technology lending group. *Id.*, pp. 9-10.

154. Edmunds did not know whether the Bank of New England makes loans to start-up broadcast operations (*i.e.*, stations that are not yet in operation). Edmunds indicated his lending group does not make loans to companies that are not yet in operation. He could not, however, speak for the entire bank. *Id.*, p. 11. Edmunds did not know whether the bank is currently making any new loans to broadcast companies. *Id.*, p. 18.

155. With respect to the reference in the May 5, 1988, letter to the bank's "reasonable and ordinary credit criteria," Edmunds indicated he did not know what such criteria would be for a communications loan, adding that "I do not make those types of loans." *Id.*, p. 12.

156. Edmunds has no knowledge of anyone making a "due diligence" inquiry with respect to a proposed loan to Palm Tree. *Id.*, p. 13. When asked whether to his knowledge there had been any review of the creditworthiness of Palm Tree for a $400,000 loan, Edmunds said not to his knowledge. *Id.*, p. 15. He confirmed that such a credit review would be necessary before the bank could provide an entity with reasonable assurance of financing. *Id.*, p. 16.

157. Palm Tree's counsel asked whether, with respect to the 1988 letter, there is a present firm intention by the bank to lend Palm Tree up to $400,000 in line with the conditions set forth in the letter. Edmunds responded "I would only say that the bank would certainly stand behind the letter."[40] *Id.*, p. 18. Palm Tree's counsel did not elicit from Edmunds what he meant in stating that the bank would "stand behind" the letter.

### Comparative Coverage

158. A joint entineering study was prepared by DataWorld of Bethesda, Maryland. The areas proposed to be served by the remaining applicants are presently served by at least five full-time aural services. Because no party seeks a comparative preference on the basis of the land area within its 1.0 mV/m contour, the only basis for an award of a comparative coverage preference is the total population within the proposed 1.0 mV/m contours of the various applicants. The pertinent population figures are reflected in the table below.

| Applicant | Population Within Proposed 1 mV/m Contour (1980 Census) | Population Within Proposed 1 mV/m Contour (1986 Update) |
|---|---|---|
| InterMart | 100,519 | 136,675 |
| Southwest | 163,951 | 222,957 |
| Kight Broadcasting | 160,865 | 218,727 |
| Palm Tree | 100,519 | 136,675 |

Joint Engineering Ex., pp. 1-3.

## CONCLUSIONS

### Palm Tree Qualifying Issues

### Financial Qualifications

159. A fundamental requirement of the Communications Act is that an applicant for broadcast facilities must be financially qualified to build and operate the station it seeks. 47 U.S.C. §308(b). To establish its financial qualifications, an applicant must have "reasonable assurance" of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed station for three months without revenue. *E.g., Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989); *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990). Under the certification procedures pertinent here, an applicant has the obligation of obtaining such "reasonable assurance" before submitting an affirmative financial certification. "In other words, the applicant may not certify its financial qualifications and then arrange financing." *Northampton Media Associates*, 4 FCC Rcd at 618, *citing Pepper Schultz*, 103 FCC 2d 1052, 1058-1059 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988).

160. In order to make a proper financial certification, an applicant must engage "in serious and reasonable efforts to ascertain predictable construction and operation costs." *Northampton Media Associates*, 4 FCC Rcd at 5519. Then it must establish the availability of funds to meet those costs. Where an applicant relies upon a "bank letter" to establish such availability, the Commission is concerned whether the letter is issued after consideration of the qualifications of the prospective borrower, is the product of normal banking practices and is not a mere accommodation. *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987); *Global Information Technologies, Inc.*, 5 FCC Rcd 3385 (Rev. Bd. 1990). In recent cases in which the *bona fides* of various bank letters have been considered, the Review Board has repeated the standard to be applied:

> Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been primarily reviewed. *Christina Communications*, [*supra*], that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

*E.g., Scioto Broadcasters*, 5 FCC Rcd at 5160; *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6322 (Rev. Bd. 1990). Palm Tree's financial showing fails in several respects to satisfy the Commission's standards.

161. While Palm Tree did obtain some cost estimates from Stan Karas prior to filing its application, it is clear that Palm Tree failed to engage in serious and reasonable efforts to ascertain all of its predicatable construction and operation costs. The most significant defect pertains to Palm Tree's estimate for construction of a tower. Stan Karas' *pro forma* contains an estimate of $40,000 for a guyed tower. However, it is obvious on the face of Palm Tree's application that a self-supporting tower was pro-

posed. Yet, neither Michelle Karas nor anyone else associated with Palm Tree made any effort to ascertain the true cost of such a tower. Stan Karas conceded that self-supporting towers are "very expensive". Tr. 823. Also of significance is the fact that Palm Tree's estimates made no provision for repayment of the bank loan upon which it intended to rely. Nothing in the record indicates that repayment of principal or interest would be deferred until after the station had been on the air for three months. In fact, the May 5, 1988 letter from the Bank of New England contains no provision providing for deferring payment of the loan.

162. It is also clear that Palm Tree has failed to demonstrate "reasonable assurance" of available funds from the source it relied on. One of the key standards in determining whether an applicant has "reasonable assurance" is the borrower's knowledge and acceptance of the terms of the proposed loan including the interest rate and collateral requirements. The record makes unmistakably clear that the May 5, 1988 letter from the Bank of New England was the product of a brief telephone conversation between Limited Partner Kevin Landry and Allyn Woodward, then senior vice president of the bank. What was key to Woodward's issuance of the letter was Kevin Landry's willingness to personally guarantee or otherwise back any loan that was made. However, Landry's and Woodward's testimony confirms that this key conversation included no discussion of the terms under which the loan was to be made. Moreover, the bank's letter makes no reference to any personal guarantee or other security from Kevin Landry. In the absence of evidence that the tentative terms of the loan have been specifically identified and are satisfactory to both borrower and lender, the bank letter can not be credited. In light of the defects discussed in Palm Tree's budget estimates and its deficient bank letter, Palm Tree was not financially qualified at the time it filed its application. Having so found, Palm Tree can not rely on its modified financial proposal. *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991).

163. Even assuming, *arguendo*, that Palm Tree had demonstrated that it was initially financially qualified, the evidence establishes overwhelmingly that Palm Tree is not currently financially qualified. Palm Tree now estimates that its total cost for construction and operation for the first three months is $528,382. Even assuming the availability of the $400,000 bank loan, Palm Tree's funds falls far short of its projected needs. Moreover, Palm Tree's budget substantially understates its costs. The budget estimate still has no provision for payments on the bank loan during the period of construction or the first three months of operation. In addition, Palm Tree has allocated $245,000 for its proposed transmitter site. The current cost estimate presumes that Palm Tree can rely upon the fair market value of the proposed transmitter site, instead of the owner's stated price of $650,000 (later reduced to $550,000). However, no Commission precedent endorses such a methodology. Commission precedent indicates that a site owner unilaterally determines whether a site is available and under what terms and it is immaterial whether an applicant believes that a site owner's conditions for assurance of a site are unreasonable. *See Kaldor Communications, Inc.*, 55 RR 2d 567 (Rev. Bd. 1984); *South Florida Broadcasting Co., Inc.*, 57 RR 2d 495,500 (Rev. Bd. 1984); *Dutchess Communications Corp.*, 58 RR 2d 381, 389 (Rev. Bd. 1985). Thus, even putting the bank repayment question aside, the actual cost of construction and operating Palm Tree's station is in the neighborhood of $830,000.

164. As previously discussed, the bank letter could not be relied on since the terms under which the loan was to be made were not agreed upon. The same deficiency applies to Palm Tree's current reliance on the bank letter. In addition, Woodward is no longer employed at the Bank of New England and his replacement, Dale Edmunds, does not know any of Palm Tree's principals. Edmunds, the only Bank of New England representative whose testimony was proffered by Palm Tree, knew nothing about the proposed loan, was not involved in broadcast lending generally and could provide no assurance that the bank was making new loans to broadcast stations at all, let alone to start-up operations. Under the circumstances, Edmunds' statement that the bank will "stand behind the letter" does not provide "reasonable assurance" of the availability of a loan.

**Palm Tree's Misrepresentations and Lack of Candor**

165. Even if Palm Tree were presumed to have acted in good faith in submission of its original financial certification, Palm Tree's subsequent lack of candor and misrepresentations regarding its financial qualifications cannot be overlooked. As discussed in paragraph 115 above, Palm Tree learned in May 1990 that its transmitter site was no longer available for lease at $1,000 per month, but rather could only be purchased for $650,000 (later reduced to $550,000). Palm Tree immediately should have acknowledged the unmistakable fact it was no longer financially qualied. Instead, without any legitimate basis to do so, it continued to rely upon its previous financial certification.

166. Furthermore, after its financial qualifications were challenged by Kight Broadcasting's petition to enlarge filed August 22, 1990, Palm Tree submitted a patently false declaration as part of its effort to avoid specification of an issue. Michelle Karas affirmatively stated that the bank of New England letter had provided a cushion of "several hundred thousand dollars" over Palm Tree's original cost estimates. That simply was not true. Even using a $200,000 cost estimate, the bottom of the range of estimates referenced in Ms. Karas' hearing testimony, the maximum "cushion" available from the Bank of New England was $200,000, not "several hundred thousand dollars." Moreover, the cross-examination of Ms. Karas revealed that Palm Tree's original cost estimates were $223,000. Thus, Palm Tree's "cushion" was actually $177,000, which was less than what the transmitter site sold for in 1988.

167. Ms. Karas' declaration was also less than candid in that it failed to disclose that Palm Tree's "recalculated" transmitter site estimate was less than half of the owners' asking price. In the same declaration, Michelle Karas represented that she concluded the changed circumstances did not affect Palm Tree's financial qualifications. Nowhere did Palm Tree disclose, however, that conclusion was based upon the unsupported assumption that the transmitter site could be acquired for some $300,000 below the price stated by the owners. Palm Tree's misrepresentations and lack of candor regarding its financial qualifications cannot be excused. They provide an independent basis for the applicant's disqualification. *E.g., Rebecca L. Boedker*, 5 FCC Rcd 2855, 2858-1860 (Rev. Bd. 1990).

**Comparative Issue**

**Diversification**

168. Under the diversification criterion, InterMart receives a moderate diversification demerit because of the other media interests held by its 100% stockholder, James E. Martin, Jr. The remaining applicants in this proceeding do not receive a diversification demerit.

**Integration - Quantitative**

169. InterMart is entitled to no integration credit. Palm Tree, Southwest and Kight Broadcasting seek 100% credit. For the reasons discussed, *below*, Palm Tree receives no integration credit; Southwest and Kight Broadcasting receive 100% credit.

170. Palm Tree's claim for 100% integration credit for the proposed role of Michelle Karas as station manager is rejected. The record makes plain that Stan Karas, her father, and Alan Landry, a limited partner, have been the driving force behind the Palm Tree application from the start. Ms. Karas played a passive role in the formation of Palm Tree and the prosecution of its application. Not only has Michelle Karas been totally disengaged from the process of obtaining financing, she has had little involvement in Palm Tree's other functions. For example, she played no role in selecting or securing Palm Tree's proposed transmitter site. She has never negotiated with any owner of the site proposed. She played no role in preparing the budget estimates appearing in the *pro forma* prepared by her father, Stan Karas. She had only the most minimal contact with Palm Tree's consulting engineer. She accepted without counterproposal or alteration of any kind the limited partnership structure presented to her. She had no input whatsoever in determining the percentages of ownership or other significant terms. In *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990), the Commission made clear that no integration credit will be awarded to a nominally active principal who has "exercised little, if any, significant control over the applicant and has not shown any real prospect of doing so." The totality of evidence undermines any claim Ms. Karas will wield significant influence (let along exclusive control) over Palm Tree. Palm Tree is entitled to no integration credit. *See Royce; Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991.

171. Southwest is entitled to 100% integration credit. The record makes plain that Southwest is solely controlled by J. Lynn Stephens, its general partner. Ms. Stephens, who has been involved in broadcasting both in an ownership capacity and in a management role, proposes to work full time as the station's general manager. There is no evidence in the record which undercuts Ms. Stephens' promise to fulfill her integration proposal. The record establishes that Ms. Stephens is knowledgeable and has been actively involved in the prosecution of Southwest's application. None of Southwest's limited partners has been involved in the prosecution of Southwest's application. Their role has been solely that of investors. Southwest's opponents urge that Southwest should be denied integration credit because of the services provided by Carl Hurlebaus and Capital Radio. However, nothing in the record suggests that Hurlebaus or Capital Radio is an unnamed principal to the application or has had any involvement in the applicant other than providing services as a consultant. Capital Radio's provision of consulting services does not translate into actual or potential control of Southwest. Relying on assistance from a paid consultant is not, by itself, reason to deny integration credit. Absent evidence that a principal other than Ms. Stephens is in control of Southwest, Southwest's integration proposal will be credited. *See Oliver and MaryAnn Kelly*, FCC 91R-100 (Rev. Bd.), released December 16, 1991.

172. Kight Broadcasting also receives 100% credit. Byron Douglas Kight will serve as General Manager of the proposed station and Mary Johnson will serve as News and Public Affairs Director. Thus, the two general partners will occupy a meaningful managerial role at the proposed station. Each of them will serve on a full-time basis (40 or more hours per week). Neither Kight nor Johnson have other significant business activity which would conflict with the effectuation of their integration pledges.

173. The record makes clear that Kight Broadcasting's ownership structure is *bona fide*. Its limited partner, Philip Memoli, has been properly insulated since the adoption of the applicant's bifurcated ownership structure. The participation of Memoli was limited to a pre-formation meeting with Kight and Johnson regarding the appropriate legal structure for the applicant, and pre-formation assistance in obtaining the February 12, 1988 bank letter upon which the applicant relies. Every significant aspect of the applicant's affairs has been handled either by Kight or Johnson including locating a limited partner, preparing a budget, selecting and retaining FCC counsel and an engineer, and locating the applicant's transmitter site. Also, both general partners have made a meaningful financial contribution to the applicant.

174. Kight Broadcasting's opponents offer no support for their contention that Johnson's integration proposal should be rejected. The findings make clear that Johnson has actively participated in the formation of Kight Broadcasting and the preparation and prosecution of its application. Also, she has made a meaningful financial contribution to the applicant. Further, she will enhance the operation of the station because of her professional background and experience in public affairs. The mere fact that Kight Broadcasting has designated Kight as the controlling vote in the event of a dispute does not justify the rejection of Johnson's integration proposal. Also, the fact that Kight, in his position as General Manager, will supervise Johnson in her role as News and Public Affairs Director is of no consequence. Johnson will be responsible for supervising all aspects of the station's news and public affairs activities. She will hire, supervise, and train a staff of at least four individuals who will be working directly under her at the proposed station. *See* Finding 55. It is, therefore, clear that Johnson will occupy a meaningful managerial role and is entitled to integration credit.

**Qualitative**[41]

175. Southwest is entitled to qualitative enhancement credit for Stephens' female status, her broadcast experience and her three-year membership on the board of directors of Station WSFP-FM, Fort Myers, Florida. Southwest cannot claim credit for past service area residency in that her home is situated beyond the 1.0 mV/m contour of the proposed station. Furthermore, she is not entitled to credit for any proposed future residence in that she failed to make either a timely or unequivocal

pledge to move within the service area of the station in the event Southwest's application were granted. Southwest is not entitled to any qualitative enhancement credit for Stephens' participation in various Charlotte County civic organizations because Southwest's 1.0 mV/m contour does not extend into Charlotte County, and Southwest has failed to demonstrate a sufficient nexus between those organizations and the needs and interests of the residents within its proposed service area. *Newton Television Limited*, 3 FCC Rcd 553, 559 n. 10 (Rev. Bd. 1988) (no civic enhancement credit where "the hearing record [does not] further describe these activities in a manner that demonstrates a nexus to the *Policy Statement's* concern with the needs, problems and interests of the service area"), *modified in part on other grounds*, FCC 89-87 (released March 24, 1989).

176. Kight's qualitative enhancement credit is superior to that of Southwest. Kight has resided within the proposed service area for the past 18 years. Johnson has resided within the proposed service area for the past 30 years. As discussed, *supra*, Southwest's principal, Stephens, has never resided in the service area. Moreover, Kight Broadcasting's residence credit is significantly enhanced by the civic activities of its principals, particularly that of Johnson. *See Ronald Sorenson*, 6 FCC Rcd 1952, 1952-1953 (1991). Also, Johnson's status as an Hispanic female is equal, if not superior, to Stephens 100% female credit. *See Horne Industries, Inc.*, 98 FCC 2d 601, 602-603 (1984); *Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991, paragraph 10. Finally, Kight and Johnson, like Stephens, receive credit for broadcast experience. Thus, considered in its qualitative aspects, Kight Broadcasting's integration proposal is superior to Southwest's.

**Auxiliary Power**

177. All four applicants receive a minor enhancement for their auxiliary power proposals.

**Comparative Coverage**

178. No applicant will provide 1.0 mV/m service to areas or populations presently receiving less than five aural services. Kight Broadcasting and Southwest, however, each would reach 80,000 plus persons more than either Palm Tree or InterMart. Accordingly, Kight Broadcasting and Southwest are entitled to a very slight coverage preference over InterMart and Palm Tree. *E.g.*, *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 (1989).

179. *In summary*, neither Kight Broadcasting or Southwest suffer diversification demerits. Also, both are equal with regard to auxiliary power and comparative coverage considerations. Kight Broadcasting and Southwest receive 100% quantitative credit. However, Kight Broadcasting's qualitative advantages make it the preferred applicant in this proceeding.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[42] the application of Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership for a construction permit for a new FM Station on Channel 249A in Punta Rassa, Florida IS GRANTED; and the applications of InterMart Broadcasting Gulf Coast, Inc., Southwest Florida FM Broadcasting, Ltd. and Palm Tree FM Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

**FOOTNOTES**

[1] *Hearing Designation Order*, DA 90-305 (released March 21, 1990).

[2] Four applicants failed to pay the required hearing fee. By *Order*, FCC 90M-2191 (released July 23, 1990), the Presiding Judge granted Christine Harvel's motion for voluntary dismissal and dismissed her application with prejudice. The application of Patrick Broadcast Associates, Inc. was similarly dismissed pursuant to *Order*, FCC 90M-3698 (released November 21, 1990). The Presiding Judge also granted Peter B. Fulton's motion for the voluntary dismissal of his application. *Order*, FCC 91M-560, released February 12, 1991.

[3] On November 16, 1990, Kight Broadcasting filed a motion seeking specification of an issue to determine whether Palm Tree made material misrepresentations, lacked candor or attempted to deceive or mislead the Commission with respect to whether Palm Tree continued to be financially qualified after its initial certification. Through the petition, Kight Broadcasting challenged the truthfulness of certain statements by Palm Tree in its effort to avoid specification of the above-quoted financial and misrepresentation/candor issues. The Presiding Judge ruled, however, the issues Kight Broadcasting sought through its November 16 petition were subsumed under the issues already added. *Order*, FCC 90M-3869 (released December 7, 1990).

[4] Rizzo handled the transaction when Stephens sold Station WEEJ, Port Charlotte, Florida, in September 1981. Tr. 37, 87.

[5] With one exception, the list of limited partners contained in the affidavit attached to Southwest's limited partnership agreement is identical to those listed in Southwest's April 20, 1990, integration and diversification statement. On the integration statement the name of Eva Nelle Sidden replaces that of Alfred Ray Patton. *See* Kight Ex. 7. Patton sold his limited partnership interest in Southwest to Sidden. Section 8.04 of Southwest's limited partnership agreement states:

> No Limited Partner shall sell, assign, transfer, encumber or convey any or all of his interest in the Partnership unless the Limited Partner has obtained the prior written consent of the General Partner, which consent shall not be unreasonably withheld.

*See* Southwest Ex. 8, p. 17; Tr. 74. Keller acted as a conduit for the transaction in that Patton sent him the information and the necessary paperwork. Stephens provided oral consent to the sale in her discussions with Keller about the transaction. Tr. 76.

[6] Keller stipulated that the firm of Verner, Liipfert represents Capital Radio in connection with the acquisition of various FM stations and in the on-going representation of those stations. Tr. 102.

[7] Although Stephens believed this letter also included the option of obtaining an interest in the cellular telephone business, the November 13, 1989, letter from Hurlebaus to Keller

does not contain any information regarding a cellular option. Stephens later explained that her understanding regarding this alternative arose in a previous discussion with Keller, and she never saw anything in writing that made reference to the cellular offer. Tr. 67, 98.

[8] The fact that each of Southwest's original limited partners accepted Hurlebaus' refund offer is reflected in the June 12 and June 14, 1990, amendments to Exhibit A of Southwest's limited partnership agreement. Southwest Ex. 8, pp. 56, 59.

[9] Although Southwest amended its application on December 16, 1988, to specify a new transmitter site, the deadline for filing amendments as of right in this proceeding was June 3, 1988. Official notice taken.

[10] The only part of Collier County within Southwest's proposed 1 mV/m contour is a small area in the far southeastern section of the service area.

[11] Ms. Karas' date of birth is November 5, 1963. Tr. 448.

[12] Palm Tree Ex. 5, p. 5 indicates that the limited partners' original contribution was to be $10,800. Ms. Karas testified that figure was a typographical error. The actual figure is $10,200. Tr. 439; *see* Palm Tree Ex. 5, p. 25.

[13] Alan Landry had also met Stan Karas previously. Tr. 1082. At one point, Stan Karas and Alan Landry had discussed the possibility of Alan Landry investing in WKZY-FM, La Belle, Florida. Tr. 355, 357.

[14] Kevin Landry testified, however, he had *never* talked to Ms. Karas. Tr. 1060-1061.

[15] Alan Landry testified, however, that among the reasons he and his brother wanted to be limited partners was to "limit our liability within some reasonable amount." Tr. 1034.

[16] Mr. Karas' *pro forma* study was originally introduced in the record, with all dollar figures redacted, as Kight Ex 11.

[17] Palm Tree's cost estimates for its proposed tower are discussed in greater detail at ¶¶ 111-114, *infra*.

[18] Ms. Karas knows she had at least one additional face-to-face meeting with Alan Landry at Besozzi & Gavin but does not remember whether it was before or after the bank letter was obtained. Tr. 404.

[19] Alan Landry testified that he requested copies of the bills from Michelle Karas directly in the spring of 1990. Tr. 1074-1075.

[20] This address previously was listed by the U.S. Postal Service as 4425 Evans Avenue.

[21] Stan Karas, Ms. Karas' father, is one of the owners of WKZY. TR. 352-353.

[22] Tr. 754-765; *see* Palm Tree Ex. 9, pp. 16-20, 24.

[23] Tr. 66-69, 749-750.

[24] Tr. 769-770.

[25] Tr. 730, 770, 774. Although not addressed in Ms. Karas' cross-examination, since Palm Tree purportedly intends to purchase rather than rent its transmitter site, the tower rent figure of $2,100 could be deducted from the total, leaving a total of $526,282.

[26] Mr. Karas confirmed that the *pro forma* figures did not provide for repayment of a bank loan. Tr. 836-837.

[27] The property in question is located at 3620 Stringfellow Road, St. James City, Florida. Palm Tree Ex. 8, p. 3.

[28] Patrick's petition to enlarge issues was filed May 3, 1990 (official notice of filing date taken).

[29] Palm Tree proffered no contemporaneous documentation demonstrating that Kevin Landry had expressed his willingness in 1988 to personally guarantee the proposed loan.

[30] T.A. Associates is a venture capital firm. Palm Tree Ex. 16, p. 10.

[31] Copies of those personal financial statements were not offered into evidence. Significantly, Woodward testified that at no time had he seen Kevin Landry's personal financial statement. Palm Tree Ex. 16, p. 11.

[32] He also confirmed that his Palm Tree investment is not terribly important in his life. Tr. 1058.

[33] In lieu of live testimony, the transcript of Woodward's November 20, 1990, deposition was admitted into evidence as Palm Tree Ex. 16. Tr. 1106. The documents identified in that transcript as Deposition Exhibits 1 and 2 are, respectively, Kight Ex. 20 and Palm Tree Ex. 17. Tr. 1018-1019, 1025.

[34] Woodward was shown Alan Landry's five-page, handwritten memorandum regarding the Punta Rassa station (Kight Ex. 20), Alan Landry's handwritten note purportedly to Woodward to which was attached a draft bank letter (Palm Tree Ex. 17) and the *pro forma* prepared by Stan Karas (Palm Tree Ex. 9). He did not recall having previously seen any of those items. Palm Tree Ex. 16, pp. 15-16.

[35] Official notice of filing dates taken.

[36] The estimate did not include, *inter alia*, any provision for repayment of the bank loan. Tr. 779.

[37] Ms. Karas never advised the Bank of New England that Palm Tree now planned to buy, rather than lease, the proposed transmitter site. Tr. 412.

[38] But at another point in her cross-examination, Ms. Karas testified she intended to negotiate the purchase price and that her "starting price will be $245,000 cash." Tr. 792.

[39] Initially, Kight Broadcasting objected to the receipt of Mr. Edmunds' deposition testimony into evidence. On the basis of that objection, the Presiding Judge ruled that the testimony would not be received unless Mr. Edmunds was made available for cross-examination. Palm Tree was given until December 7, 1990, in which to provide the parties notice that a Bank of New England official would be made available for cross-examination. Tr. 1112-1114. Subsequently, Kight Broadcasting withdrew its objection to receipt of Edmunds' deposition testimony and it was received into evidence. *Order*, FCC 90M-3980 (released December 17, 1990).

[40] Counsel for the bank, Patrick M. Reagan, who was present at the deposition, objected at this point on the basis of whether Edmunds had authority to bind the bank. *Id.*, p. 19.

[41] Assuming Palm Tree received quantitative credit, it would receive qualitative enhancement for Ms. Karas' gender. Also, it would receive credit for Ms. Karas's limited service area residence, her minimal civic involvement and her broadcast experience. As discussed, *infra*, Palm Tree's qualitative enhancement is inferior to that of Kight Broadcasting.

[42] In the event exceptions are not filed with 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-384**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6884 |
| Table of Allotments, | RM-7205 |
| FM Broadcast Stations. | |
| (Epworth and Dyersville, Iowa, and Dodgeville, Wisconsin)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 31, 1991; Released: January 9, 1992**

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making*[2] issued in response to a Petition for Rule Making filed by Margaret Keefer ("Keefer"), who petitioned for the allotment of Channel 247C3 to Epworth, Iowa as that community's first local broadcast transmission service. Keefer filed timely initial comments expressing her continuing interest in the allotment of Channel 247C3 to Epworth and her intention to apply for a construction permit to operate on that channel, if allotted. Also before us are the separate Petition for Rule Making, treated herein as a counterproposal, filed by Louise E. Hamlin, licensee of Station WDMP-FM, Channel 257A, Dodgeville, Wisconsin ("Hamlin")[3] ; the Reply Comments of Design Homes, Inc., licensee of Station KDST-FM, Dyersville, Iowa ("Design"); and a Motion To Strike those Reply Comments filed by Keefer.

2. In her counterproposal, Hamlin requests the substitution of Channel 257B1 for Channel 257A in Dodgeville and the modification of her license to specify operation on that channel. To accommodate this upgrade, Hamlin also requests the substitution of Channel 247A for Channel 257A at Dyersville, Iowa, and modification of the license for Station KDST-FM, Channel 257A, Dyersville, to specify operation on Channel 247A. Hamlin offers to pay all reasonable and necessary costs that would be incurred by Station KDST-FM in converting from Channel 257A to Channel 247A. We have consolidated Hamlin's petition with this proceeding because of the mutual exclusivity between Keefer's Epworth proposal and Channel 247A at Dyersville, the channel without whose allotment Hamlin cannot obtain her Dodgeville upgrade.

3. In response to Keefer's proposal, Design filed Reply Comments. Design concurs with Hamlin that an alternative allotment in Dyersville is necessary to facilitate the upgrade proposed by Hamlin at Dodgeville. Design acknowledges that the allotment of Channel 247A to Dyersville would facilitate the proposed allotment of Channel 257B1 in Dodgeville by eliminating the shortspacing that would result between Channel 257A at Dyersville and Channel 257B1 at Dodgeville. Design also acknowledges that Hamlin will reimburse Design for all costs it would incur in modifying its facilities to operate on Channel 247A. Design agrees to change Station KDST-FM's frequency to accommodate the proposed Dyersville upgrade.[4]

4. To resolve the mutual exclusivity between the allotment of Channel 247C3 at Epworth and Channel 247A at Dyersville, Design proposes that Channel 291A be allotted to Epworth, eliminating the current short-spacing between Station WDMP-FM and Station KDST-FM and providing a first local service at Epworth. However, Channel 291A is ineligible for consideration because neither Keefer nor any other party has expressed an interest in a lower class channel at Epworth. On the contrary, Keefer has only expressed an interest in a Class C3 channel at Epworth.[5]

5. Since Channel 291A cannot be considered, there remain before us two alternative proposals: the substitution of Channel 257B1 for Channel 257A at Dodgeville, or the allotment of Channel 247C3 to Epworth. The results of a Commission engineering staff study indicate that no Class C3 channel other than Channel 247C3 can be allotted at Epworth; that no alternative adjacent Class B1 channel can be allotted at Dodgeville; and that no alternative Class A channel can be allotted at Dyersville that will accommodate both proposals. Accordingly, the resolution of this proceeding involves only a comparison of the allotment of a first local service at Epworth with the upgrade of an existing station at Dodgeville. The Epworth proposal, an allotment to a community of a first local service, is clearly preferable under applicable Commission allotment priorities.[6] Therefore, we will allot Channel 247C3 to Epworth.[7]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

---

[1] The communities of Dyersville, Iowa, and Dodgeville, Wisconsin, have been added to the caption.

[2] 4 FCC Rcd 6696 (1989).

[3] Public notice of Hamlin's counterproposal was given on December 20, 1989, Report No. 1804.

[4] In view of Design's concurrence to change channels, it was not necessary to issue an Order to Show Cause concerning the modification of the license for Station KDST-FM, Dyersville.

[5] *See* Part 2 of the Appendix that is contained in all Notices of Proposed Rule Making that are released by the Commission at the outset of all allotment proceedings involving the FM service. Since Channel 291A is ineligible for consideration, Keefer's Motion To Strike Design's Reply Comments is moot.

[6] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). The FM priorities are (1) first full-time aural service, (2) second full-time aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

[7] Channel 247C3 can be allotted to Epworth in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction. The coordinates for Channel 247C3 at Epworth are 42-26-42 and 90-55-55.

| City | Channel No. |
|---|---|
| Epworth, Iowa | 247C3 |

7. IT IS FURTHER ORDERED, That Louise E. Hamlin's Petition For Rule Making (RM-7205) IS DENIED.

8. IT IS FURTHER ORDERED, That Margaret Keefer's Motion To Strike IS DISMISSED as moot.

9. The window period for filing applications for Channel 247C3, Epworth, Iowa, will open on **February 25, 1992,** and close on **March 26, 1992.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Belford V. Lawson, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-594**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-7142 |
| Table of Allotments, | RM-7318 |
| FM Broadcast Stations. | |
| (Harrisburg and Albemarle, | |
| North Carolina)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 31, 1991; Released: January 9, 1992**

By the Assistant Chief, Allocations Branch:

1. At the request of York David Anthony ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 12 (1990), proposing the allotment of Channel 224A to Harrisburg, North Carolina, as the community's first local FM service. Petitioner filed comments supporting the allotment and restating his intention to apply for the channel, if allotted. Piedmont Crescent Communications, Inc. ("Piedmont"), licensee of Stations WEGO(AM), Concord, North Carolina, and WABZ-FM, Albemarle, North Carolina, filed a counterproposal requesting the substitution of Channel 264A for Channel 265A at Albemarle, North Carolina, the reallotment of Channel 264A to Harrisburg, and the modification of its license for Station WABZ-FM accordingly.[2] Petitioner filed reply comments supporting Piedmont's counterproposal and restating his interest in Channel 224A.

2. Piedmont states that Station WABZ-FM operates with 3 kilowatts of power at 61 meters height above average terrain and is a grandfathered short-spaced station to first adjacent Station WPCM, Channel 266C, Burlington, North Carolina, and to Station WWWB, Channel 262C, High Point, North Carolina. As a result, it submits that Station WABZ-FM's present interference-free service area encompasses only 396 square kilometers as compared to a fully-spaced 3 kilowatt station's interference-free service area of 1,809 square kilometers. Further, the station's 60 dBu contour covers an additional 203 square kilometers but this area receives interference from Station WPCM at Burlington. Piedmont states that it has unsuccessfully attempted to relocate the transmitter away from Burlington and High Point. Therefore, it believes that the public interest would be served by reallotting Station WABZ-FM to Harrisburg because it would eliminate the short-spacings and enable the station to improve its facilities while also providing Harrisburg with its first local FM transmission service. Piedmont claims that the change in community would result in the provision of an additional FM reception service to approximately 93,200 persons in Cabarrus and Stanly Counties, North Carolina, and additional service to Mecklenburg, Union, Iredell, Anson and Rowan Counties as well.

3. As to the aural service remaining at Albemarle, Piedmont states that two full-time AM stations will continue to provide the community with local aural transmission service. In addition, Piedmont submits that Albemarle receives a 60 dBu or greater signal from 11 FM stations and a 500 uV/m or better signal from 15 AM stations. Piedmont also submits that Station WABZ-FM will continue to provide service to approximately one-third of its present service area. Therefore, it argues that reallotting Station WABZ-FM to Harrisburg will have only a minimal effect on the diversity of program choices.

4. We have reviewed the proposals before us and find that the public interest would be served by allotting at least one FM channel to Harrisburg as the community's first local FM transmission and first local aural service. We believe that the public interest is best served by providing this first local FM transmission service by the local transmission service. Further, if only one allotment can be justified, a decision on whether the first local service should be provided by granting the drop-in proposal or the reallotment proposal must be made. Therefore, we believe these proposals should be considered simultaneously. For administrative ease, we have considered this proposal as a "counterproposal" for the purpose of giving public notice and setting forth a response period.

After the record closed, the Trustees of Davidson College ("Trustees"), licensee of noncommercial educational FM Station WDAV, Davidson, North Carolina, filed an Informal Objection to Piedmont's counterproposal. Petitioner and Piedmont jointly filed a Motion to Strike and Reply to Objection of Davidson College. However, in light of the Trustees' subsequent withdrawal of their Informal Objection, these pleadings will not be considered.

---

[1] The community of Albemarle has been added to the caption.

[2] Public Notice of Piedmont's counterproposal was given on March 15, 1990, Report No. 1810. Piedmont originally filed comments supporting the allotment of Channel 224A at Harrisburg and stating an intention to apply for the channel. These comments were withdrawn with the filing of its counterproposal.

A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. *See, e.g., Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990). In this case, there is no technical conflict between the two requests. However, the proposals are interrelated, as both proposals seek to provide Harrisburg with its first local FM transmission service. The grant or denial of either request would change the character of the remaining request. Therefore, we must determine whether the public interest is served by providing Harrisburg with its first local transmission service or its first and second

allotment of Channel 224A. There is no technical impediment or opposition to the allotment and petitioner has restated his intention to apply for the channel.[3]

5. We now turn to Piedmont's request to substitute Channel 264A for Channel 265A at Albemarle and reallot the channel to Harrisburg. The Commission evaluates the public interest benefits pursuant to the FM allotment priorities. These priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). Piedmont does not claim any first or second aural service benefit from the allotment of Channel 265A to Harrisburg and the community will receive its first local service when Channel 224A is activated. Therefore, Piedmont's request will be analyzed within the context of the fourth priority, other public interest matters.

6. In comparing the two communities, we find that Harrisburg has a 1980 U.S. Census population of 1,433 persons and is located 21.4 kilometers (13.3 miles) northeast of Charlotte, North Carolina. Harrisburg, which has no operating local aural transmission services, receives aural service from 13 FM and 10 AM services. Albemarle, on the other hand, has a population of 15,100 persons and is located 61.8 kilometers (38.4 miles) east of Charlotte. Albemarle receives local aural transmission service from one FM and two AM stations and reception service from 13 FM and 3 AM services. Based on our review of Piedmont's proposal, we find that the reallotment of Channel 264A to Harrisburg would offer public interest benefits. It would remove grandfathered short-spacings to Stations WPCM and WWWB and it would permit Station WABZ-FM to operate as a six kilowatt Class A station. In addition, a Commission staff engineering analysis indicates that the change in community, in conjunction with the operation of Station WABZ-FM as a six kilowatt facility, would permit Station WABZ-FM to serve some 327,012 additional persons in Rowan, Cabarrus, Mecklenburg, Stanly and Union Counties.

7. However, our analysis also indicates that removal of the station from Albemarle will result in a loss of service to some 56,396 persons in Stanly, Rowan, Davidson and Montgomery Counties. Furthermore, the vast majority of persons residing within the gain area, approximately 291,000 of the 327,012 persons, are in Cabarrus and Mecklenburg Counties, and are presently served by thirteen full-time aural reception services. Therefore, only 36,012 persons in the gain area are currently served by fewer than thirteen reception services. In addition, although Piedmont claims that it has been unsuccessful in improving service at its present location, we note that it has an application pending to relocate its transmitter and improve its facilities.[4] According to the engineering supplement to Piedmont's counterproposal,[5] the application fully complies with the Commission's Rules and, if granted, will enable Station WABZ-FM to operate with 6 kW of power and provide interference free service to an area of 1,000 square kilometers instead of its present 396 square kilometers.

8. The Commission has stated," The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another." *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990); *see also Report and Order (Eatonton and Sandy Springs, Georgia; Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580 (1991), *app. for rev. pend.* In this instance, the public interest benefits of Piedmont's proposal are counterbalanced by the fact that over 56,000 persons would lose Station WABZ-FM's signal. The benefits are further diminished by the fact that approximately 89 percent of the gain area that would result from the change in community is currently served by thirteen full-time aural reception services. We do not believe that the public interest would be served by allotting Harrisburg its second local FM transmission service by removing the third local aural transmission service from Albemarle, a community 10 times larger, and the consequent loss of reception service to over 56,000 persons. Therefore, we will deny Piedmont's proposal.

9. Channel 224A can be allotted to Harrisburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.7 miles) northwest to avoid short-spacings to Station WKRR, Channel 222C, Asheboro, North Carolina, and Station WZNS, Channel 225C, Dillon, South Carolina.[6]

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Harrisburg, North Carolina | 224A |

11. The window period for filing applications will open on **February 25, 1992,** and close on **March 26, 1992.**

12. IT IS FURTHER ORDERED. That the counterproposal of Piedmont Crescent Communications, Inc., to substitute Channel 265A for Channel 264A at Albemarle, North Carolina, reallot Channel 265A to Harrisburg, North Carolina, and modify the license of Station WABZ-FM accordingly (RM-7318), IS DENIED.

---

[3] We recognize that the engineering portion of Piedmont's counterproposal was prepared by the petitioner and contains the statement that the counterproposal is to be considered "either in lieu of, or in addition to," petitioner's proposal. However, because the petitioner filed both comments and reply comments supporting the allotment of Channel 224A to Harrisburg and reiterated his intention to apply for the channel, we believe that this statement does not constitute a withdrawal of the petitioner's proposal.

[4] Piedmont's application has been accepted for filing (File No. BPH-900412IG).

[5] *See* Engineering Supplement to Piedmont's counterproposal, p.2, n.1-2.

[6] The coordinates for Channel 224A at Harrisburg are North Latitude 35-20-28 and West Longitude 80-41-30.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-296**

In the Matter of

Amendment of Section 73.202(b), RM-6090
Table of Allotments,
FM Broadcast Stations.
(Christiansted, Virgin Islands)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: December 30, 1991; Released: January 9, 1992**

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 5781 (1991), proposing the substitution of Channel 228B for Channel 228A at Christiansted, Virgin Islands, and modification of the construction permit of Station WAVI, Christiansted, Virgin Islands, to specify operation on Channel 228B.[1] St. Croix Wireless Co., Inc., permittee of Station WAVI and petitioner for the Channel 228B upgrade at Christiansted, filed comments reaffirming its interest in the proposed upgrade. No other comments or reply comments were filed.

2. We believe that the public interest would be served by the substitution of Channel 228B for Channel 228A at Christiansted, and modification of the Station WAVI construction permit to specify operation on Channel 228B, because it will provide Christiansted with a wide coverage area FM service. Channel 228B can be allotted to Christiansted in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.0 kilometers (2.5 miles) east.[2]

3. Accordingly, pursuant to the authority found in Section 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| Community | Channel No. |
|---|---|
| Christiansted, Virgin Islands | 228B, 236B, 258B, 262B, 291B |

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communication's Act of 1934, as amended, the construction permit of St. Croix Wireless Co., Inc., for Station WAVI, Christiansted, Virgin Islands, IS MODIFIED, to specify operation on Channel 228B in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Station WAVI was formerly assigned to Channel 232A. On August 22, 1991, as a result of international negotiations, we modified the Station WAVI construction permit to specify operation on Channel 228A. *See Order (Christiansted, Virgin Islands)*, 6 FCC Rcd 5215 (1991). In view of this modification of the underlying construction permit, we are processing the petition for rule making as a request for a Channel 228A to Channel 228B upgrade.

[2] The reference coordinates for the Channel 228B allotment at Christiansted, Virgin Islands, are 17-44-07 and 64-40-12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

BellSouth Telephone Companies — Transmittal No. 428

Revisions to Tariff F.C.C. No. 4

## MEMORANDUM OPINION AND ORDER

**Adopted: December 23, 1991; Released: December 26, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On September 30, 1991, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 428 to introduce LightGate Service. US Sprint Communications Company Limited Partnership (Sprint) petitioned to reject, or in the alternative, to suspend and investigate, BellSouth's transmittal on October 15, 1991. On October 25, 1991, BellSouth replied. For reasons stated below, we herein reject BellSouth's Transmittal 428.

2. LightGate Service is a restructure of BellSouth's existing high capacity DS3 service.[1] LightGate Service includes alternative route protection as a feature of the offering. BellSouth Tariff F.C.C. No. 4., Section 7.2.9(A). The tariff also provides that where alternate routing is not available, "a special construction charge for expediting construction of the alternately routed protection facilities will apply." *Id.*

3. In its petition, Sprint claims certain of the terms and conditions of LightGate Service are unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). Specifically, Sprint contends that BellSouth's application of special construction charges for alternate routing is discriminatory, and that customers may be unfairly penalized or forced to pay special construction charges. Sprint believes that these facilities should be part of the basic service. Sprint Petition at 5.[2] BellSouth does not address Sprint's allegation of discrimination; however, BellSouth maintains that its special construction alternative is reasonable. BellSouth Reply at 1112.

4. BellSouth Transmittal 428 specifies alternate routing as a feature of LightGate Service, and establishes charges for the service based on this feature. However, alternate routing will not be available to all Lightgate customers. The tariff nonetheless imposes the same rate for all customers, whether or not they receive alternate routing. We conclude that charging the same price to customers who are offered different services is unreasonable discrimination for purposes of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

5. Accordingly, ITS IS ORDERED that BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 428 IS REJECTED.

6. IT IS FURTHER ORDERED that US Sprint Communications Company Limited Partnership's petition to reject, or alternatively, to suspend and investigate IS GRANTED to the extent indicated above and otherwise IS DISMISSED without prejudice.

7. IT IS FURTHER ORDERED that BellSouth Telephone Companies SHALL ISSUE revisions to the tariff no later than five business days from the release date of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

---

[1] Transmittal 428 establishes four options for DS3 service: 1 DS3 (LightGate 1), 3 DS3s (LightGate 2), 12 DS3s (LightGate 3), and 24 DS3s (LightGate 4). DS3s which are currently provided on a flat rate basis will be provided on a distance sensitive basis under LightGate. The per system Local Channel charge will include the first one-half air mile; and, additional charges will apply for each additional system one-half air mile. In addition, the six existing DS3 interoffice channel mileage bands will be replaced by three mileage bands. All exiting DS3 service customers will be converted to LightGate Service as of the effective date of Transmittal 428. BellSouth will not apply nonrecurring charges and will waive nonrecurring and termination charges "for DS3 rearrangements or changes in payment plans completed for existing customers during the ninety-day period following the effective date of LightGate service." Description and Justification (D&J) at 2.

[2] Sprint raises other arguments against Transmittal 428. In view of our decision to reject this transmittal on other grounds, we need not discuss these arguments at this time.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3405

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: December 24, 1991; Released: December 24, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3405 to modify Virtual Telecommunications Network Service (VTNS) Option 34. VTNS modified Option 34 is described as a generally available offering designed and engineered for voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 34: decrease the Basic Charge and modify the Service Elements included in the Basic Charge; increase the Minimum Annual charge; introduce an International Usage Volume Pricing Plan; modify certain Changes provisions; expand the Domestic Data Transmission Capability and Voice Transmission Capability Volume Pricing Plan; and make certain textual changes. AT&T Transmittal No. 3405 Description and Justification (D&J) at 2-5. Transmittal 3405 is scheduled to take effect on December 25, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject the transmittal, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate the transmittal on September 11, 1991. AT&T filed a reply on September 20, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 34.[2] In that Order, the Commission prohibited the bundling of inbound service in Tariff 12 Options but exempted existing options from the prohibition. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 34, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 34 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. Williams argues that AT&T has failed to demonstrate that modified Option 34 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 34 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

5. AT&T replies that this filing makes no fundamental change to Option 34; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3405 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 34 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

6. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 34 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

7. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3405, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 34, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

9. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3405, IS REJECTED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3405, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3405, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1156 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order, supra*, note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-324**

In the Matter of

Advanced Technology Cellular
Telecommunications

**ORDER**
**Proceeding Terminated**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 18, 1991, Advanced Technology Cellular Telecommunications (ATCT) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, ATCT states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, ATCT stated that its total charge for the same call under the rates then in effect would be $7.97. This represents a reduction of more than 17 percent from the highest total charge ATCT reported in its June 21 report. It was on the basis of that report and the rates ATCT then had in effect that we found that ATCT's rates appeared to be unjust and unreasonable. ATCT no longer charges the rates that prompted this proceeding. ATCT therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-324 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that ATCT's rates are just and reasonable.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Ameritech Operating Companies
Revisions to Tariff F.C.C. No. 2

Transmittal Nos. 499, 509, 557, and 573

Ameritech Petition for Waiver of
Part 69 of the Commission's Rules

Dedicated Network Access Lines,
Open Network Architecture

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 26, 1991; Released: December 27, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION AND BACKGROUND

1. In this Order, we consider a contingent Ameritech request of a waiver of Part 69 of the Commission's Rules, to tariff dedicated network access lines (DNALs) as switched access rate elements, as well as DNAL-related issues in a series of pending Ameritech transmittals. Other issues involving these transmittals are considered in a companion Order adopted today.

2. On December 18, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal 499 to initiate implementation of its Open Network Architecture (ONA) plan. By Transmittal 499, Ameritech sought to unbundle various access offerings into Basic Service Elements (BSEs) and Basic Serving Arrangements (BSAs).[1] Prior to that filing, Ameritech requested a waiver of Part 69 of the Commission's Rules, which specifies the access rate elements, to establish new rate subelements for many of its BSEs.[2] Ameritech did not request an access waiver for its dedicated network access lines (DNALs), a BSA intended to carry signalling information, because it assumed its DNALs were special access services. [3] D&J at 7-8. Subsequently, Ameritech filed several other tariff transmittals which, among other things, supplemented Ameritech's DNAL cost support. These transmittals preceded the Commission's *Part 69 ONA Order*, adopted on July 11, 1991, which adopted ONA-based modifications to the Part 69 Rules, and established a November 1, 1991, deadline for tariff filings. [4] On August 23, 1991, Ameritech filed Transmittal No. 557 to conform its ONA filing to the requirements of the *Part 69 ONA Order*.

3. DNALs provide dedicated channels between the customer's premises and an Ameritech central office and are used to transmit network information or network control information between an ESP and Ameritech's network. Ameritech includes two types of DNALs in its ONA tariff filings. The first type is the Circuit Switch Facility Control (CSFC) DNAL. [5] The second type consists of two subtypes, the Simplified Message Desk Interface (SMDI), and the Simplified Message Desk Interface/Expanded (SMDI/E) DNALs. [6] In addition, the Ameritech transmittal would offer various BSEs for use with DNAL BSAs.[7]

4. On October 4, 1991, the Bureau rejected a tariff transmittal filed by GTE, which sought to tariff as special access a service similar to Ameritech's DNALs.[8] On October 29, 1991, Ameritech amended Transmittal No. 557 to offer its DNALs as transport. On October 30, 1991, Ameritech filed a contingent petition for waiver of Part 69 of the Commission's Rules to establish subelements in the switched transport element for its DNALs. Specifically, Ameritech seeks a waiver to establish two rate elements, one for its CSFC DNAL, and one for its SMDI DNAL.

---

[1] For a discussion of the definitions of "BSA" and "BSE", see Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4525 (1991) (*Part 69 ONA Order*).

[2] Ameritech Petition for Waiver of Sections 69.106(b) and 69.205(c) of the Commission's Rules, filed June 26, 1990.

[3] Ameritech Transmittal No. 557, D&J, at 4-6.

[4] The *Part 69 ONA Order* requires BOCs to offer one lineside and one trunkside switched access BSA. Additional switched access BSAs, or the unbundling of switched access elements other than an unbundling of a BSE, requires a Part 69 waiver. *Part 69 ONA Order*, 6 FCC Rcd at 4527.

[5] Ameritech Transmittal 499, D&J at 7-8. The CSFC DNAL can be either a two-wire or a four-wire analog voice grade channel functionally identical to those available under Ameritech's special access tariffs. The CSFC DNAL is used in combination with the Make Busy Arrangement (BSE). *Id.* at 18-19.

[6] Ameritech intends to offer a variety of DNALs with different transmission capacities. *See* Ameritech Transmittal No. 499, 4th Revised Page 454.24, 4th Revised Page 454.24.1. (issued December 18, 1990, currently scheduled to become effective December 31, 1991). Another variety of DNAL, a 56 kbps DS0 channel, can also be used to provide interconnection to Ameritech's CCS network. However, Ameritech's CCS interconnection DNALs are not at issue in this proceeding.

[7] SMDI is a DNAL used to deliver Remote Activation of Message Waiting and Call History Package Delivery as BSE services. Ameritech requires its customers to purchase a separate DNAL for each end office at which they wish to order those BSEs. Ameritech Transmittal 499, D&J at 7-8. SMDI/E is a DNAL used to deliver the same BSEs, but makes those BSEs available at any Ameritech end office connected to Ameritech's CCS network. Ameritech Transmittal 509, D&J at 1-3. The SMDI and SMDI/E DNALs are 1200 baud, four-wire voice channels with modem terminations not available with the Circuit Switch Facility Control DNAL.

[8] General Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, 6 FCC Rcd 6109, (Com.Car.Bur. 1991) (*GTE LIDB Order*). The Bureau has also granted Southwestern Bell a waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish a subelement in the Dedicated Transport rate element for a service similar to Ameritech's DNAL. Southwestern Bell Telephone Companies Petitions for Waiver of Part 69 of the Commission's Rules, 6 FCC Rcd 6095, 6099 (Com.Car.Bur. 1991) (*Southwestern LIDB Order*).

## II. PLEADINGS

5. Ameritech states in its waiver petition that it is requesting a waiver to comply with the *Part 69 ONA Order*.[9] No oppositions to Ameritech's petition were filed. However, in its petition against Ameritech Transmittal 557, Ad Hoc argues that DNALs are not special access elements, but an inseparable element of switched communications, and that Ameritech's special access structure for its DNALs should be rejected.[10] Ameritech responds that no waiver is required for these BSAs because they should be classified by analogy to WATS lines and FX closed ends.[11] Other pleadings also pre-date the filing of this waiver petition, and argue that a waiver is necessary.[12]

## III. DISCUSSION

### A. Classification of DNALs

6. Ameritech's argument, that its proposed DNALs should be considered special access facilities, is not supported by Ameritech's description of these "DNALs," and the Part 69 Rules. Both of these DNALs are offered to transmit information relevant only to the provision of services using local switching. Transmission facilities associated with local switching are generally not classified as special access by the Part 69 Rules.[13] Ameritech's argument that these facilities should be considered special access by analogy to WATS and FX is not persuasive. These transmission facilities will not perform analogous functions.[14]

7. In addition, this issue has already been addressed. In the *Part 69 ONA Order*, the Commission stated that DNALs associated with switched services appear to require Part 69 waivers.[15] In the *Southwestern LIDB Order* and the *GTE LIDB Order*, the Bureau examined rate structures for facilities similar to Ameritech's DNALs and reached the same conclusions. Specifically, at issue in those proceedings was the proper classification of the 56 kilobit per second (kbps) DS0 line used to connect an interexchange carriers's common channel signalling network to a local exchange carrier's common channel signalling network. The Bureau found that, since those facilities are "used to deliver, or facilitate the delivery of, switched access service," those facilities should be tariffed as transport.[16]

8. Based on this test, it appears that the Ameritech DNALs are also transport. Ameritech notes that all the BSEs available with these DNALs "are provided using equipment in the central office which is assigned to the Local Switching category," and "work in conjunction with Switched Access services."[17] Since these BSEs are unbundled from the Local Switching category, the DNALs in question are "used to deliver, or facilitate the delivery of, switched access service." Hence, under the test established in the *GTE LIDB Order* and the *Southwestern LIDB Order*, these DNALs should be tariffed as switched access.

### B. Waiver Request

9. The Commission in the *Part 69 ONA Order* explained that ONA was designed to promote efficient and innovative use of the network by enhanced service providers (ESPs), while preventing BOCs from discriminating against independent ESPs in favor of BOC ESP operations.[18] The Commission required that carriers creating an additional switched access BSA must obtain a waiver of Part 69.[19] In the *Part 69 ONA Order*, the Commission found also that DNALs designated as BSAs "appear to require" Part 69 waivers.[20] ONA should also promote efficient use of the network, both by Ameritech and independent ESPs, thus actively promoting the efficient provision of enhanced services.[21]

10. In this case, the use of DNALs permitting ESPs to transmit information directly into Ameritech's switched network may well provide valuable new capabilities to ESPs. It will also make it possible for Ameritech to provide the BSEs associated with those DNALs. Based upon these considerations, and the fact that the waiver petition is unopposed, we find good cause, pursuant to Section 1.3 of the Commission's Rules, for waiving Part 69 to permit the establishment of transport subelements for the two DNALs proposed by Ameritech.

### C. Transport Issues

11. Ameritech argues in its waiver petition that the costs of these DNALs should be recovered on a flat, monthly basis. [22] In the *Transport Rulemaking*,[23] the Commission established three goals for transport pricing. Any rules governing transport rates should promote efficient use of facilities by allowing the LECs to price in the

---

[9] Ameritech Petition at 2. Ameritech characterizes its waiver petition as "contingent" upon a determination that a waiver for DNALs is "deemed necessary." Ameritech Petition at 1.

[10] Ad Hoc Petition (557) at 8-10. Ad Hoc filed its petition before Ameritech filed its waiver.

[11] Ameritech Transmittal 557, D&J, at 4-6, Ameritech Reply (September) at 22-23.

[12] Allnet Petition (557) at 7-8; Ad Hoc Petition (557) at 8-10. *See also* Ameritech Reply (September) at 22-23.

[13] *See, e.g.*, Sections 69.305, 69.111, and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.305, 69.111, 69.112.

[14] Ameritech has not demonstrated that "DNALs" have some shared characteristic that make them similar to each other and different from other kinds of facilities. In other words, it is not clear that DNALs possess some categorical "essence" which can be used to distinguish the class of all DNALs from the class of all non-DNALs.

[15] *Part 69 ONA Order*, 6 FCC Rcd at 4527 n. 29.

[16] *GTE LIDB Order*, 6 FCC Rcd at 6110; *Southwestern LIDB Order*, 6 FCC Rcd at 6099. Ameritech maintains that the Commission erred in the *Part 69 ONA Order*, and the Bureau erred in both the *GTE LIDB Order* and the *Southwestern Bell LIDB Waiver Order*. Specifically, Ameritech asserts that its DNALs should be tariffed as special access services. Ameritech Petition at 3-8. A petition for waiver of Part 69 of the Commission Rules to establish new rate subelements, however, is not the appropriate vehicle to request reconsideration of several prior Commission and Bureau Orders. *See* Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106; Section 1.741 of the Commission's Rules, 47 C.F.R. § 1.741.

[17] Ameritech Transmittal 499, D&J, at 5 n.2; Ameritech Transmittal 557, D&J, at 6.

[18] *Part 69 ONA Order*, 6 FCC Rcd at 4525.

[19] *Part 69 ONA Order*, 6 FCC Rcd at 4527.

[20] *Part 69 ONA Order*, 6 FCC Rcd at 4527 n. 29.

[21] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 4 FCC Rcd 1, 16 (1988).

[22] Ameritech Petition at 3-7.

manner that best reflects the way in which costs are incurred, should be conducive to full and fair interexchange competition, and should not interfere with the development of access competition.[24] Flat rate charges for the DNALs before us satisfy those goals.

12. First, a flat rate appears to reflect the manner in which costs are incurred, since DNALs are dedicated to the use of a single customer, and its costs do not appear to be usage-sensitive. A flat rate should thus promote efficiency. Second, a flat rate will not interfere with full and fair interexchange competition, because these DNALs are designed primarily for use by ESPs and will be available to all. Their use by interexchange carriers is likely to be small and should not adversely affect competition. Finally, because these DNALs will probably not be used for local exchange service, a flat rate will not interfere with the development of access competition, and therefore, the Commission's third goal is also satisfied.

13. When the Commission applied these goals to the transmission services at issue in the *Transport Rulemaking*, it concluded that pricing should remain on a per-minute basis pending further Commission action. In reaching that conclusion, the Commission had to strike a balance among its three goals, since some goals would be satisfied by flat rate pricing, while other goals would be better served by a usage-based rate structure. In this case, however, there is no need to balance countervailing considerations in evaluating whether to price DNALs on a flat rate basis, since flat rate pricing satisfies all three of the Commission's goals. Thus, while the result differs from that of the Order in the *Transport Rulemaking*, pricing these DNALs on a flat rate basis does not conflict with the Commission's goals in the *Transport Rulemaking*. Finally, we note that no one opposed Ameritech's waiver request. We accordingly waive the requirements of that Order to the extent necessary to enable Ameritech to tariff the two DNALs discussed in this Order, *supra*. We note, however, that this waiver is subject to the Commission's ultimate decision in the *Transport Rulemaking* on the appropriate rate structure for transport.

## IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, filed by the Ameritech Operating Companies, to establish subelements in the transport rate element for its Circuit Switch Facility Control dedicated network access line and its Simplified Message Desk Interface dedicated network access line, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[23] MTS and WATS Market Structure, CC Docket No. 78-72 and Transport Rate Structure and Pricing, CC Docket No. 91-213, released August 30, 1991 (*Transport Rulemaking*).

[24] *See Southwestern Bell LIDB Order*, 6 FCC Rcd at 6099-6100, paras. 31-33.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: December 27, 1991**

## COMPTEL FILES MOTION FOR INTERIM ORDER REQUIRING AT&T TO CEASE FURTHER DISTRIBUTION OF PROPRIETARY CIID CARDS AND PERMIT VALIDATION AND BILLING OF EXISTING CARDS

**Pleading Cycle Established**

**COMMENTS: February 10, 1992**
**REPLY COMMENTS: March 11, 1992**

On December 20, 1991 the Competitive Telecommunications Association (CompTel) and 19 of its member companies filed a motion, requesting that the Commission issue an interim order requiring American Telephone and Telegraph Company (AT&T) to halt the further issuance of proprietary calling cards in the Card Issuer Identifier (CIID) format and permit all interexchange carriers to validate and bill AT&T's proprietary CIID cards until the Commission releases a final decision in Docket No. 91-115.

Interested parties may file comments regarding the CompTel motion no later than **February 10, 1992.** Reply comments may be filed no later than **March 11, 1992.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the motion and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3422

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: December 26, 1991; Released: December 27, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3422 to modify Virtual Telecommunications Network Service (VTNS) Option 21. VTNS modified Option 21 is described as a generally available offering designed and engineered for voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 21: increase the Basic Charge; modify certain Measured Charges; modify the Domestic Usage Volume Pricing Plan; modify the International Usage Volume Pricing Plan; increase the Minimum Annual Charge; modify the Installation Charge waiver and introduce a credit for Data Transmission Capability (DTC) access components used in conjunction with Measured Ports; modify the minimum Service Element requirement for Ports and DTCs; modify the Credit Allowance; delete Add/Delete charges for certain international Service Elements; delete Installation Charges for Authorization Codes; modify the DTC and Voice Transmission Capabilities (VTCs) Volume Pricing Plan; introduce an international DTC, VTC, and Satellite Transmission Capability Volume Pricing Plan; and delete certain Optional Features. AT&T Transmittal No. 3422 Description and Justification (D&J) at 25. Transmittal 3422 is scheduled to take effect on December 28, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3422, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal 3422 on September 16, 1991. AT&T filed a reply on September 26, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 21.[2] In that Order, the Commission prohibited the bundling of inbound service in Tariff 12 Options but exempted existing options from the prohibition. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that these revisions substantially alter Option 21, which petitioners assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 21 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. Williams argues that AT&T has failed to demonstrate that modified Option 36 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 21 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory anti-discrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

5. AT&T replies that this filing makes no fundamental change to Option 21; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3422 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 21 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

6. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 21 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

7. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3422, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 21, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages.[4]

9. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3422, IS REJECTED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3422, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3422, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1157 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order, supra*, note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COLUMBIA COMMUNICATIONS CORPORATION — File Nos. CSS-90-010, CSS-90-011

Application for Authority to Use and Offer for Lease the C-Band Transponders on the NASA TDRSS Satellites at 41° W.L. and 174° W.L. for the Provision of International Fixed-Satellite Services

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: December 30, 1991; Released: December 31, 1991**

By the Commission:

1. We have before us for consideration an application filed by Columbia Communications Corporation (Columbia) on August 6, 1990, for authority to use and offer for lease, for the provision of international and foreign domestic fixed-satellite services, twelve C-Band transponders located on National Aeronautics and Space Administration (NASA) Tracking and Data Relay Satellite System (TDRSS) spacecraft presently on station at the 41° West Longitude (TDRS-41) and 174° [1] West Longitude (TDRS-174) orbital locations. No oppositions to Columbia's application were filed. Pan American Satellite (PAS) filed comments regarding the potential for adverse interference between the TDRS-41 satellite and PAS's planned PAS-2 satellite at 43°, but PAS stated that it is not seeking denial of the Columbia application.

2. On December 18, 1991, the Department of State advised the Federal Communications Commission that the obligations of the United States under Article XIV(d) of the INTELSAT Agreement have been satisfied with regard to the use of the TDRS-41 and TDRS-174 satellites for the provision of communications not interconnected with the public switched network.[2] For the reasons set forth below, we grant Columbia final authorization to construct, launch and operate the above-mentioned TDRS satellites.

## I. THE APPLICATION

### A. The TDRSS System

3. The TDRSS is owned by NASA, and is comprised of two operational spacecrafts and one spare spacecraft. The operational spacecrafts are the TDRS-41 satellite and the TDRS-174 satellite. Both TDRS-41 and TDRS-174 are on station, operational, and available for Columbia's use. The spare is an in-orbit spacecraft located at 171° West Longitude. Three separate and distinct payloads are incorporated into each of the spacecraft: S-Band, Ku-Band, and C-Band. The C-Band payload on each of the TDRSS satellites consists of twelve 36 MHz transponders utilizing 5.5 watt amplifiers. Each transponder is multi-directional and will operate on the following frequency bands: Earth-to-Space (Uplink) -- 5.925 to 6.425 GHz; and Space-to-Earth -- (Downlink) -- 3.700 to 4.200 GHz. Both the TDRS-41 and TDRS-174 satellites have a remaining estimated useful life of 12 years.

4. Pursuant to contract with NASA, Contel Federal Systems (Contel) is responsible for tracking, telemetry, and control (TT&C) functions for the TDRSS system and for data transmission to and from the S-Band and Ku-Band payloads on board. Contel provides these services through its TT&C facilities in White Sands, New Mexico. The TT&C functions of Columbia's TDRSS system C-Band capacity are fully encrypted and can only be operated via the existing TDRS Control Ground Station at White Sands, New Mexico. It operates on government frequencies at Ku-Band with an S-Band backup. The operating frequencies, polarization, bandwidth and power into the antenna are covered by a government allocation. No separate TT&C link for C-Band service is required or possible, and thus, the TT&C system for Columbia's TDRSS system C-Band transponders will not cause harmful interference to other authorized space and terrestrial radio stations. C-Band operations will be controlled by Columbia through its monitoring and control ground station facilities. Columbia will have the capability to turn the TDRSS satellite's C-Band transponders on and off through a communications interface with the TDRSS Ground Control Station. According to Columbia, Contel is also responsible for the TT&C functions of the TDRSS spacecraft C-Band capacity. However, access to and from the satellite's C-Band capacity, and monitoring of the C-Band payload for compliance with the Commission's requirements, is the responsibility of Columbia.

### B. Proposed Use of the C-Band Services

5. Columbia's TDRS-41 C-Band services will be provided on a transatlantic basis, between the United States and Europe and Nothern Africa. Columbia's TDRS-174 services will be provided on a transpacific basis, between the United States and the Pacific Rim (from Hong Kong in the south to Korea in the north), Asia. Columbia contemplates that its services will be used primarily by broadcasters, news agencies, video programmers and cable systems, and multinational corporations and other international organizations.

6. Columbia explains that once it secures all necessary domestic and international regulatory approvals, it will have the exclusive right to provide services over these satellites' C-Band transponders. Columbia asserts that the C-Band transponders on each of the TDRSS satellites are equivalent in technical performance to the C-Band transponders on most of the U.S. domestic satellites currently in geostationary orbit over the United States. Each of the transponders operates in 36 MHz of bandwidth, and utilizes 5.5 watt amplifiers. Uplinking to the TDRSS C-Band capacity will be acheived through earth stations ranging from 5 meters to 11 meters in diameter, and downlinking will be acheived through the use of receive earth stations ranging from 2 meters to 5 meters in diameter.

7. Columbia will use the C-Band transponders to provide a variety of video, voice, and data transmission services – including, but not limited to, high-speed facsimile.

video teleconferencing, computer-to-computer telecommunications, teletext, videotext, electronic mail, and data collection and distribution services. Columbia will market the TDRSS C-Band capacity on a non-common carrier, long-term lease basis. Further, Columbia intends to offer only space segment services. Columbia's customers will be responsible for making their own ground segment arrangements.

## II. DISCUSSION

8. In reviewing an application for an international telecommunications satellite system separate from INTELSAT, we must determine whether the proposal is consistent with our *Separate Systems* decision[3]; that is, whether the applicant possesses the requisite legal, technical and financial qualifications, and whether the grant of the request would be in the public interest. We find that Columbia meets these requirements and issue it a final authorization to construct, launch and operate its proposed international satellite system.

9. *Freeze Order*. Columbia's application for the TDRS-41 satellite is subject to the Commission's *Freeze Order* imposed on the acceptance of any newly filed applications for space stations requesting orbital positions within the $30^0$ W.L. and $60^0$ W.L. orbital arc.[4] In 1985, the Commission instituted the "freeze" to create a static orbital deployment plan to facilitate technical coordination under the International Radio Regulations[5] and technical consultations under the INTELSAT Agreement[6] for the space stations for which applications already had been filed.[7] Columbia requests waiver of the Commission's freeze to permit the filing of its TDRS-41 satellite application.

10. Based upon the three factors set forth below, we find that the grant of Columbia's waiver request for the filing of the TDRS-41 satellite application will serve the public interest and will not frustrate the underlying purpose of the freeze.[8] First, Columbia is seeking to operate unused commercial capacity on TDRS-41, a satellite already in operation in a NASA-assigned orbital position. Second, the lease of the C-band capacity of the TDRS-41 satellite will provide approximately $61 million to the U.S. Federal Treasury over the term of the lease. Finally, Columbia states that it will accept a license to operate conditioned upon its cessation of use of the TDRS-41 satellite's C-band capacity once a U.S.-licensed domestic or separate system spacecraft is placed into service.[9]

11. We reaffirm in this decision that the presence of an in-orbit satellite is, in itself, a factor insufficient to justify waiver of the freeze.[10] In the instant application, however, we find that the public interest benefits presented here - the use of currently idle capacity on an in-orbit satellite to increase competitive options of customers, a significant infusion of funds into the U.S. Federal Treasury, and that Columbia is willing to have its authorization conditioned as discussed above - together persuade us that it is in the public interest to grant Columbia a waiver of the Commission's *Freeze Order*.

12. Regarding the last of the three factors, we find that a condition imposed on the use of the TDRS-41 satellite, subject to certain modifications, will safeguard the policy of the *Freeze Order* by eliminating any possible restriction on future orbital position or frequency band assignments that may be required for pending international satellite applications filed prior to the freeze.[11] *See* para. 15-17 *infra*. In this context, we will condition Columbia's authorization subject to its cessation of use of the TDRS-41 satellite immediately upon Commission request. Additionally, we will not take into consideration Columbia's conditionally assigned frequency bands and orbital slot for purposes of future consultations necessary for any pending satellite system application filed prior to the freeze.

13. *Technical Qualifications*. Technical consultation has been completed between INTELSAT and the United States, the United Kingdom and Hong Kong. We will condition Columbia's license on operation of the facilities in accordance with the parameters and conditions agreed to during the INTELSAT technical consultation.

14. Regarding the potential interference with PAS, we are encouraged that PAS and Columbia appear to have resolved their technical differences.[12] In this context, we note that the Commission has stated on numerous occasions in the context of both international and domestic fixed-satellite service that we expect satellite operators to resolve potential interference problems because they can best weigh the technical and economic tradeoffs involved in negotiating a coordination agreement.[13] The Commission will intervene in the event the parties demonstrate that a coordination agreement cannot be reached after an exhaustive good faith effort. Finally, we note that we continue to retain jurisdiction to impose operational constraints on an operator's system as necessary.

15. *Full Frequency Reuse*. Columbia has satisfied all the technical requirements of the *Separate Systems* decision, except for full frequency reuse. Each of Columbia's proposed satellites is equipped with 12 operational 36 MHz receive and transmit channels. In its application, Columbia seeks a waiver of the Commission's full frequency reuse requirement. The full frequency reuse requirement is a technical "performance" or "capacity" standard based on certain assumptions concerning the characteristics of a reasonable state-of-the-art space station.[14] The full frequency reuse requirement was established by the Commission to ensure that the orbit/spectrum resource is used in the most efficient manner. In the *Separate Systems* decision, however, the Commission recognized that this type of frequency reuse may be impossible or inappropriate for some systems. Therefore, the Commission explicitly stated that any applicants proposing not to employ such reuse demonstrate why the reuse criteria should or should not apply to them. It further stated that such applications would be considered on a case-by-case basis.[15]

16. We find that grant of Columbia's request for waiver of the reuse requirements is appropriate under the circumstances of this case. In the Pan American Satellite Corporation *Modification Order*,[16] the Commission stated that it would view a waiver of the full frequency reuse requirement favorably as long as the non-compliant satellite is making some use of the orbit/spectrum resource which otherwise would not be used, and as long as such use does not preclude the use of the resource by a satellite which meets the Commission's full frequency reuse requirements. Judged under these criteria, we find that the operation of the C-Band capacity on the TDRSS satellites would put to use otherwise idle orbital/spectrum resource. Moreover, since the satellites are already launched and occupying an orbital slot, it would be impossible for Columbia to redesign the communications system of the TDRSS satellites in order to meet the full frequency reuse requirements. Finally, grant of a waiver of the full fre-

quency reuse requirement in this case would not preclude the use of the resource by a satellite which meets the Commission's requirements.

17. Finally, the grant of this waiver of the Commission's full frequency reuse requirement is conditional. Should the Commission find that another satellite facility operating on the subject frequencies would be able to meet the full frequency reuse requirements, and that such operation would be incompatible with the operation of the TDRSS satellites, Columbia would be required to cease operation on those frequencies.[17]

18. *Legal Qualifications*. The Commission already has found that Columbia possesses the necessary legal qualifications to be a Commission licensee.[18] Columbia proposes no change in ownership or control of its separate system. Therefore, we find Columbia legally qualified under Title III of the Communications Act to provide international satellite services.

19. *Financial Qualifications*. Columbia notes that the Columbia TDRSS system C-Band capacity has been constructed and successfully launched. Columbia thus states that, accordingly, it will not incur any construction or launch costs in connection with this application. Columbia's costs for operating the TDRSS system for one year, including the cost of acquiring and operating the Columbia monitoring station, as discussed in the application, are $11,512,000.

20. In the *Separate Systems* decision, the Commission adopted the domestic satellite financial qualification standard,[19] with certain procedural variations, for review of international separate satellite systems applications. The Commission held that an international separate satellite system applicant must demonstrate its financial preparedness to assume the first year's costs and liabilities involved in constructing, launching and operating its satellite system for one year in order to be granted final authorization for its proposed system. The Commission applied this standard in authorizing PAS and Orion Satellite Corporation to construct, launch and operate separate satellite systems.[20]

21. In the *Separate Systems* decision, the Commission stated that, generally, an otherwise qualified applicant will be granted permission to begin construction of the proposed system only upon a demonstration of: (1) the estimated costs of proposed construction and launch, and any other initial expenses for the proposed space stations; (2) the estimated operating expenses for one year after launch of the proposed space stations; and (3) the applicant's current financial ability to meet both the costs of construction and launch and operating expenses for one year after launch.[21] The Commission further stated that in order to meet the third requirement, new entrants[22] " . . . shall submit an exhibit indicating the estimated income or revenues anticipated from the proposed operation of the satellite system necessary to meet the estimated costs of construction, launch and operation, along with any additional information required by the Commission which would include: (1) scheduled debt financing or stock issues; (2) established lines of credit: or (3) other forms of internal financing."[23]

22. In this context, Columbia states that it will pay NASA $61,386,576, in six annual payments, for the lease of TDRS-41 and TDRS-174 capacity. Columbia asserts that it can therefore project with a high degree of accuracy its major cost during the first year of operation -- the annual lease payment of approximately $10.2 million. Columbia further states that it does not intend to provide earth station services. Columbia intends to lease transponder capacity, on a long-term basis; it also intends that its customers will provide their own earth station uplinks and downlinks. Accordingly, Columbia maintains that other costs of providing TDRS-41 and TDRS-174 service are limited to monitoring use of the system, legal and technical support functions, administrative costs, and other reasonable and customary miscellaneous business expenditures. At present, Columbia estimates that its annual costs, other than lease payments to NASA, will range between $ 1.3 and $2.2 million.

23. We find that Columbia has satisfied the Commission's final financial qualifications requirement. On December 20, 1991, Columbia filed a commitment letter from TRW to Columbia that states that TRW confirms that it will provide Columbia with the sum of $12.4 million in return for Columbia's agreement to enter into a long-term lease of some of the C-Band transponders on the Columbia-TDRS satellites located at $41^0$ West and $174^0$ West longitude. The sole condition placed on TRW's agreement to provide these funds to Columbia is Columbia's receipt of final FCC authorization to construct, launch and operate the C-Band portions of the TDRS satellites.[24] Additionally, Columbia submitted a consolidated financial statement of TRW that shows that, as of December 31, 1990, TRW had assets totalling $2.23 billion, with cash and equity equivalents totalling $72 million, enough to meet its $12.4 million commitment to Columbia.

24. *Public Interest Benefits*. In the *Separate Systems* decision, the Commission found that separate systems would stimulate technological innovation and service development, improve network efficiencies, reduce user costs and create new business and trade opportunities through international communications.[25] The Commission concluded that separate systems will enable users with special communications needs to meet those needs with new methods for packaging and transmitting information.

25. Columbia notes that the market for U.S. programming overseas continues to grow steadily, and U.S. cable systems and broadcast entities are looking for new markets into which to expand. Columbia states that it is the right time to be bringing the TDRS-41 satellite's C-Band capacity on line due to its excellent coverage of the newly liberalized countries of Eastern Europe. Further, Columbia asserts that the TDRSS system C-Band capacity will also be appropriate for numerous private corporations and other data services users that desire the opportunity to custom-tailor their services in a manner not possible through INTELSAT. By selling and leasing its space segment capacity on a non-tariffed basis, Columbia will offer its customers the ability to make long-term plans for the use of the facilities and will be able to reduce user costs. It will offer customers who purchase capacity the added benefit of financial investments. Columbia's TDRSS system C-Band facilities may also serve to alleviate C-Band capacity shortages in overseas domestic markets. Columbia is also prepared to lease capacity for foreign domestic communications as the market may demand.

26. Columbia has decided that it will not offer any gateway earth station services. Its capacity will be space segment only. Columbia notes that, at some point, as data services become a major part of Columbia's business -- particularly in the Pacific Ocean Region -- Columbia may elect to provide a gateway earth station facility for access

to the TDRSS system's C-Band capacity. At present, the only earth station Columbia will provide is the monitoring station which it will operate to ensure that the TDRSS system C-Band capacity is performing in accordance with Commission requirements. Based on these and the above considerations, we find that the grant of this application will serve the public interest

### III. ORDERING CLAUSES

27. We find that Columbia is legally, financially and technically qualified, under Title III of the Communications Act, and the *Separate Systems* decision, to hold final authority to provide its proposed international fixed-satellite services.[26]

28. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and (j), 308, 309, and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i) and (j), 308, 309 and 319, that the application filed by Columbia Communications Corporation, File Nos. CSS-90-010 and CSS-90-011, IS GRANTED and Columbia Communications Corporation IS AUTHORIZED to operate the C-band capacity on the in-orbit TDRS-41 and TDRS-174 satellites for the purpose of providing international communications services, subject to the terms and conditions set forth below.

29. IT IS FURTHER ORDERED that this Order only applies to Columbia's provision of service between the United States and the United Kingdom and Hong Kong in accordance with the parameters summarized in the INTELSAT Board of Governors document entitled "Article XIV(d) Consultation Concerning the Proposed Use of the Comumbia Satellite System", BG-90-67E, 27 August 1991. Any communications between the United States and other locations will require additional consultations under Article XIV(d) of the INTELSAT Agreement.

30. IT IS FURTHER ORDERED that the authority granted herein is specifically conditioned on operation of the Columbia networks in accordance with the technical parameters and conditions described in the INTELSAT Board of Governors document entitled "Article XIV(c) and (d) Technical Consultations Concerning the Columbia Satellite System", BG 90-33E, 23 August 1991 and the attachments thereto.

31. IT IS FURTHER ORDERED that the operation of the TDRSS satellites' C-band capacity is limited to the provision of services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with the public switched network (except for emergency restoration service).

32. IT IS FURTHER ORDERED that the Commission shall retain jurisdiction over the use of all space segment within Columbia's system to ensure compliance with the conditions of this authorization and with the Commission's rules, regulations and policies.

33. IT IS FURTHER ORDERED that Columbia shall comply with the Commission's *Separate Systems* decision, 101 F.C.C. 2d 1046 (1985), as amended in the reconsideration orders, FCC 84-144 (released April 17, 1986) and FCC 86-471 (released October 31, 1986).

34. IT IS FURTHER ORDERED that Columbia is temporarily assigned the orbital location at $41^0$ West Longitude and $174^0$ West Longitude for operation of the C-band capacity on the TDRSS satellites.

35. IT IS FURTHER ORDERED that the temporary assignment of any orbital locations to Columbia Communications Corporation is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right of the use of the orbit or spectrum. Such a change may be ordered, *inter alia*, in the event that the national security or the public interest so requires, or to implement any of the objectives or policies set forth in the Commission's *Separate Systems* order, 101 FCC 2d 1046 (1985). Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

36. IT IS FURTHER ORDERED that Columbia shall file with the Commission copies of any operating agreements entered into by Columbia within 30 days of execution.

37. IT IS FURTHER ORDERED that Columbia Communications Corporation's request for waiver of the Commission's *Freeze Order* IS GRANTED subject to the condition that Columbia shall be required to cease use of the TDRS-41 satellite immediately upon the request of the Commission.

38. IT IS FURTHER ORDERED that Columbia Communications Corporation's request for a waiver of the full-frequency-reuse requirement IS GRANTED subject to the condition that Columbia shall be required to cease operation of its C-band capacity if the Commission finds that operation of another satellite facility complying with the full frequency reuse requirements would be incompatible with the operation of the TDRSS satellites on these frequencies.

39. Columbia Communications Corporation is afforded 45 days from the date of release of this order to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

40. This Memorandum Opinion, Order and Authorization is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

### FOOTNOTES

[1] Partly in order to facilitate Columbia's consultation with INTELSAT, NASA agreed to relocate the Pacific Ocean Region satellite to $174^0$ from its original position at $174.3^0$ West Longitude (W.L.). Letter to Wendell R. Harris, Assistant Bureau Chief/International, Common Carrier Bureau from Raul R. Rodriguez, Counsel to Columbia (December 9, 1991).

[2] Letter from Steven W. Lett, Deputy Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, to George Li, Chief, International Facilities Division, Common Carrier Bureau (December 18, 1991).

[3] *Establishment of Satellite Systems Providing International Communications (Separate Systems)*, 101 FCC 2d 1046 (1985), *on recon.*, 61 R.R. 2d 649 (1986), *further recon.*, 1 FCC Rcd 439 (1986).

[4] *See Processing of Pending Applications for Space Stations to Provide International Communications Service*, FCC 85-296 (released June 6, 1985)(hereinafter *Freeze Order)*. Specifically, the bands to which the order applies are the 4, 6, 11, 12 and 14 Ghz bands. Columbia correctly asserts that the portion of its application which requests authority to operate the C-band capacity on the TDRS-174 satellite is not subject to the *Freeze Order*.

[5] Radio Regulations, Geneva 1979, ratified by the United States in September, 1983.

[6] INTELSAT Intergovernmental Agreement, August 20, 1971, 23 U.S.T. 3813, TIAS No. 7532.

[7] *Freeze Order*, *supra* at para. 3.

[8] The U.S. Court of Appeals for the District of Columbia stated that a general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant that proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[9] Application, Section II-12.

[10] *Systematics General Corporation*, 2 FCC Rcd 5406 (1987). We distinguish Columbia's waiver request from the relief sought by Systematics General Corporation (SGC) by the unique combination of factors present in the instant waiver request. In weighing the balanced policy goals of the freeze against the public interest benefits asserted by SGC in lifting the freeze, the balance was in favor of adherence to the freeze policy. By contrast, due to the particular factors in Columbia's request (discussed in the text), the public interest benefits outweigh adherence to the freeze policy, especially in light of the strict conditions imposed herein.

[11] *Columbia Communications Corporation*, File No. 932-DSS-P/LA-84.

[12] *See* Letter from Philip A. Rubin, Principal Technical Consultant and David K. Aylward, Columbia to Wendell R. Harris, Assistant Bureau Chief, International, Common Carrier Bureau, FCC (March 11, 1991).

[13] *See Pan American Satellite*, 6 FCC Rcd at 5133; *Orion Satellite Corp.*, 5 FCC Rcd 4937 (1990).

[14] *See Licensing of Space Stations in the Domestic Fixed - Satellite Service*, 54 R.R. 2d 577 (1983)(hereinafter *Reduced Orbital Spacing)*. In this decision, the Commission set forth its full frequency reuse standards for domestic satellites in terms of a satellite's capacity. The Commission required that a 4/6 GHz space station have a capacity equivalent to that which is provided by a space station having transponders that use 864 MHz of a 1000 MHz (with two-times frequency reuse) assignment and provide a total power of 192 watts. A 12/14 GHz space station is required to have a capacity equivalent to a space station having transponders that use 860 MHz of a 1000 MHz (with two-times frequency reuse) assignment and provide a total power of 400 watts.

[15] *See Separate Systems*, 101 FCC 2d at 1172.

[16] *Pan American Satellite Corporation*, FCC 86-257 at para. 47 (released May 21, 1986).

[17] We grant Columbia a waiver of the full frequency reuse requirements conditioned on these terms rather than on a special temporary authorization. *Compare Systematics General Corporation*, 2 FCC Rcd 5406 (released August 31, 1987); *Systematics General Corporation*, DA 87-1699 (adopted November 19, 1987). We make this decision taking into account the fact that the separate systems industry is not established and a waiver would serve as a means of encouraging industry growth. Further, since special temporary authorizations cover six month periods, we believe that a grant of a waiver will better serve the public interest by avoiding otherwise adverse effects on Columbia's efforts to market the satellite capacity on a long-term basis. *See* Pan *American Satellite Corporation*, 3 FCC Rcd 677, n. 18 (1988).

[18] *See Columbia Communications Corporation*, 1 FCC Rcd 1202, 1203 (1986).

[19] *See also Separate Systems*, Reconsideration Order, 61 R.R. at para. 40.

[20] *See Pan American Satellite*, 2 FCC Rcd 7011 (1987), *Orion Satellite Corp.*, 6 FCC Rcd 4201 (1991).

[21] *See Separate Systems*, 101 FCC 2d at 1171, para 234.

[22] The Commission distinguishes between two classes of entities for purposes of demonstrating the applicant's current finanial ability to meet both the costs of construction and launch and operating expenses for one year after launch. The first consists of established entities with existing assets and operating income sufficient to meet the estimated construction, launch and operating costs. For these entities, the Commission requires the submission of a verified balance sheet together with supporting documentation showing that current assets and existing operating income are sufficient to meet estimated costs. The second group identified by the Commission consists of "newly established entities unable to submit a current balance sheet." *Id.* at 1172, para. 235. Columbia falls into this latter class.

[23] *Id.*

[24] *See* Letters from H. E. Cypert, Vice President, TRW Space and Technology Group to Clifford Laughton, President, Columbia (December 20 and 24, 1991).

[25] *See Separate Systems*, 101 FCC 2d at 1177.

[26] In granting Columbia final authorization pursuant to the *Separate Systems* decision, we note that one of the conditions mandated by that decision, namely, the prohibition of interconnection by separate systems with the public switched network, is currently under review by the Commission. *See* Letter from James A. Baker, II, Secretary of State, and Robert Mosbacher, Secretary of Commerce, to Alfred C. Sikes, Chairman, FCC (November 27, 1991). Pending the outcome of that review, we will continue to disallow such interconnection, except for emergency restoration service and except as otherwise authorized by this Commission.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC.,
Complainant,

v.

| | |
|---|---|
| NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, | E-90-428 |
| BELL TELEPHONE COMPANY OF PENNSYLVANIA, | E-90-429 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES, | E-90-430 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, | E-90-431 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, | E-90-432 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, | E-90-433 |
| THE DIAMOND STATE TELEPHONE COMPANY, | E-90-434 |
| NEW JERSEY BELL TELEPHONE COMPANY, | E-90-435 |
| NEW YORK TELEPHONE COMPANY, | E-90-436 |
| CAROLINA TELEPHONE AND TELEGRAPH COMPANY, | E-90-437 |
| INDIANA BELL TELEPHONE COMPANY, | E-90-439 |
| MICHIGAN BELL TELEPHONE COMPANY, | E-90-440 |
| OHIO BELL TELEPHONE COMPANY, | E-91-19 |
| WISCONSIN BELL, INC., | E-91-20 |
| PACIFIC BELL TELEPHONE COMPANY, | E-91-21 |
| NEVADA BELL TELEPHONE COMPANY, | E-91-22 |
| SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, | E-91-23 |
| SOUTH CENTRAL BELL TELEPHONE COMPANY, | E-91-24 |
| SOUTHWESTERN BELL TELEPHONE COMPANY, | E-91-25 |
| CINCINNATI BELL TELEPHONE COMPANY and | E-91-26 |
| GTE SOUTHWEST, INC., | E-91-27 |

Defendants.

**ORDER**

**Adopted: December 20, 1991; Released: January 8, 1992**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 697 (Com.Car.Bur. 1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MCI COMMUNICATIONS CORPORATION,
Complainant,

v.

| | |
|---|---|
| CINCINNATI BELL TELEPHONE COMPANY, | E-90-423 |
| NEW YORK TELEPHONE COMPANY and | E-90-442 |
| NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, | E-90-443 |

Defendants.

**ORDER**

**Adopted: December 20, 1991; Released: January 8, 1992**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 696 (Com.Car.Bur. 1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICALL SYSTEMS OF LOUISVILLE,
Complainant,

v.

| | |
|---|---|
| CINCINNATI BELL TELEPHONE COMPANY, | E-91-006 |
| SOUTH CENTRAL BELL TELEPHONE COMPANY, | E-91-007 |
| SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, | E-91-008 |
| SOUTHWESTERN BELL TELEPHONE COMPANY, | E-91-009 |
| INDIANA BELL TELEPHONE COMPANY, | E-91-010 |
| MICHIGAN BELL TELEPHONE COMPANY, | E-91-011 |
| NEW YORK TELEPHONE COMPANY, | E-91-012 |
| OHIO BELL TELEPHONE COMPANY, | E-91-013 |
| BELL TELEPHONE COMPANY OF PENNSYLVANIA and | E-91-014 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES, | E-91-015 |
| Defendants. | |

**ORDER**

**Adopted: December 20, 1991; Released: Janaury 8, 1992**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 698 (Com.Car.Bur. 1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC. d/b/a
IDB INTERNATIONAL
GTE HAWAIIAN
TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS
COMPANY LIMITED
PARTNERSHIP, and
WORLD COMMUNICATIONS, INC.

File No. SCL-91-001

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Extending Between the United States, Germany and the Netherlands

**CABLE LANDING LICENSE**

**Adopted: December 19, 1991; Released: January 10, 1992**

By the Commission:

1. On May 28, 1991 seven United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned Joint Application[2] requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system known as TAT-10 Cable System (TAT-10), extending from the United States mainland to Germany and the Netherlands. A Petition to Deny the application was filed by Submarine Lightwave Cable Company (SLC); the Joint Applicants[3] filed an Opposition in response, to which SLC filed a Reply and Clarification. The German Ministry for Post and Telecommunications (Ministry) intervened in this proceeding by submitting to the Department of State a letter, which was made part of the record.[4] SLC responded to the Ministry's letter.[5] The Ministry then submitted a second letter[6], which in turn prompted a further response from SLC.[7]

**The TAT-10 Cable System**

2. TAT-10 will land at Green Hill, Rhode Island in the U.S. and extend to Norden, Germany and then Alkmaar, Netherlands. The proposed cable system consists of six segments. Segments A, C and F are, respectively, the cable stations at Green Hill, Rhode Island (U.S.), Norden, Germany and Alkmaar, Netherlands. Segment E is the intermediate repeater station at the Island of Terschelling, Netherlands, located between Segments C and F. Segment B consists of the whole of the submarine cable system, provided between and including the System Interfaces at Segments A and C. Segment D consists of the whole of the submarine cable system, provided between and including the System Interfaces at Segments C and F.

3. TAT-10, comprised of three fiber pairs, will employ 1.55 micron laser technology operating at 560 Mbit/s on each working fiber pair. The capacity on each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 Minimum Investment Units (MIUs).[8] The capacity of TAT-10 will be 252 MIUs per fiber pair. For voice services, digital circuit multiplication system (DCMS) can be employed to derive approximately 150 virtual voice paths from each MIU.

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. The telecommunications entities in the following locations will participate as owners: Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Hong Kong, Ireland, Japan, Korea, Mexico, the Netherlands, New Zealand, Norway, the Philippines, Poland, Singapore, Spain, Sweden, Switzerland, Taiwan, Turkey and the United Kingdom.

**Pleadings**

5. SLC filed a Petition to Deny the Joint Applicants' Cable Landing License application.[9] First, SLC contends that the TAT-10 application is in violation of the reciprocity provisions of the Cable Landing License Act because alleged inappropriate conduct on the parts of officials of the German administration, specifically the Ministry, the PTT - Deutsche Bundespost (DBP) - and AT&T has resulted in the failure of SLC, and its German partner - Preussen-Elektra Telekom GmbH (PET), to secure a cable landing license or its equivalent to land its private cable system in Germany. According to SLC, the Ministry and DBP were involved in detailed meetings concerning its own private US -Germany cable project and AT&T, as a manufacturer, had been involved in the cable project. Because the German administration has authorized the landing of the TAT-10 cable system, in which AT&T and DBP are owners, and has not granted reciprocal landing rights for SLC's private cable, SLC believes that the instant application should be denied for lack of reciprocity in accordance with the provisions of the Cable Landing License Act. SLC also is concerned that it has no assurance that the cable system will be free of DBP's alleged discriminatory tariff structure. Therefore, SLC believes that DBP's interest in TAT-10 might result in lower customer charges for DBP's landline facilities connecting with TAT-10 than for those connecting with the proposed SLC-PET cable terminal.

6. SLC also contends that the TAT-10 application is in violation of the public interest requirements of the Communications Act. SLC believes that AT&T's involvement in the planning, procurement, manufacturing, construction, operation, ownership and usage of transatlantic cable is contrary to the public interest. In this instance, SLC points out that AT&T's dominance has defeated the Commission's Private Cable Policy[10] since both the SLC cable and a proposed MCI-BT cable project have been thwarted. Thus, SLC believes that the instant application, as well as applications to land and operate the TAT-11 cable system, must be denied to prevent independent cable providers

and manufacturers from being placed at a competitive disadvantage. According to SLC, grant of the application would result in restrained competition, higher consumer costs, and limitations on technological advances. In this regard, SLC argues that TAT-10 provides no technical innovations, no intra-cable restoration capacity, and raises serious antitrust issues. For these reasons, SLC requests denial of the application and/or the separation of AT&T's international business service and its submarine cable manufacturing business.

7. With respect to SLC's reciprocity concerns, the Joint Applicants[11] state that the only relevant question for jointly-owned common carrier cable systems is whether U.S. participants have received reciprocal treatment from foreign administration partners.[12] In this case, the Joint Applicants note that this concern has been satisfied by virtue of the joint ownership nature of common carrier systems. The Joint Applicants assert that the purpose of the reciprocity requirements is not to secure business opportunities for U.S. private cable companies, but to ensure that U.S. interests abroad are not jeopardized vis-a-vis similar foreign interests in the U.S. In addition, AT&T denies both its domination of transatlantic cable projects and the adversity of its role in cable projects to U.S. public interest.

8. AT&T asserts that SLC's real complaint is its failure in marketing the private cable system to end users and its lack of prospects of common carrier use of its proposed cable system by DBP due to the advent of TAT-10. The Joint Applicants note that any private transoceanic cable system must "succeed or fail on its own merits and not through Commission action that would guarantee common carrier use of the systems." They argue that Commission policy with respect to private cable systems precludes the consideration of the comparative merits of SLC's proposed private system and the Joint Applicants' TAT-10 common carrier system.

9. Finally, the Joint Applicants assert that SLC should not be able to bootstrap the Petition to Deny the TAT-10 Cable Landing License into a broader proceeding against the TAT-10 and TAT-11 Section 214 applications as well as the TAT-11 Cable Landing License. AT&T asserts that SLC is not an interested party with respect to the Section 214 applications under Section 63.52 of the Commission's Rules. SLC contends that it is an interested party since its proposed cable will be competitive with TAT-10 and that it would suffer an adverse impact because of the lack of reciprocity.

10. The German Ministry filed a letter with the State Department in response to SLC's Petition to Deny.[13] The Ministry stated that SLC had not completed its application by filing necessary information. In response, SLC acknowledged that it did not file the information, stating that it was competitively sensitive and would have been available to DBP, which was involved in the proposed TAT-10.[14] In its subsequent letter[15], the Ministry provided a detailed response to the events and allegations contained in SLC's pleadings; this in turn prompted a letter from SLC.[16]

**Discussion**

11. Under the Cable Landing License Act no person is permitted to land or operate a submarine cable directly or indirectly connecting the United States with any foreign country unless a written license to land and operate such cable has been issued by the President of the United States.[17] The Cable Landing License Act provides that the President may withhold or revoke such a license "when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cable so licensed." Thus, the Cable Landing License Act's consideration of reciprocity goes beyond the narrow consideration as to whether in a particular instance, as here, there is joint ownership between a foreign administration on one end of the cable system and its U.S. partners on the other end.

12. Pursuant to our obligations under 47 U.S.C. §§34-39, the Department of State has been notified and, after having coordinated with both the National Telecommunications and Information Administration and the Defense Information Systems Agency, has approved the landing of TAT-10 in the United States.[18]

13. SLC seeks denial of the application based on lack of reciprocity in connection with its inability to obtain a license from the German Administration for its private cable system. SLC states that it was informed by a DBP official that its cable landing project would be approved by the Ministry if DBP were interested. Because DBP and AT&T subsequently became involved in the joint planning of the TAT-10, SLC assumes that improper conduct must have occurred in the interim to undermine its project.

14. The Ministry has acknowledged that an agreement regarding the appropriate application procedure under German law was reached with SLC: specifically, it was agreed that no landing license application would be required, but rather a license application for the setting up and the operation of the cable across German territory would be required. According to the Ministry, it stated that an application for this license should include certain information, such as ownership structure, routing, restoration concept and landing points. The Ministry noted that it has received nothing from either SLC or PET, despite a subsequent request to PET for the aforementioned information. In its response to the Ministry's letter, SLC does not dispute the Ministry's account of events. Rather, SLC states that at the September meeting when the information was requested, it was becoming clear that DBP was no longer interested in the cable project. Thus, SLC asserts that there was growing reluctance to provide confidential information to the Ministry because of fear that such information would be disclosed to DBP, a partner in a competing cable system.

15. We find no basis to deny the application for lack of reciprocity by the German administration. SLC does not deny that it never completed its application. Nor does SLC argue that the information requested by the Ministry was somehow improper or otherwise designed to impede the progress of its proposal. Indeed, the information requested is similar to the information routinely filed in applications before the Commission for the construction of common carrier and non-common carrier cables. SLC does not elaborate on how it ascertained that DBP was no longer interested in its cable project, although SLC may have drawn this conclusion from DBP's planned participation in the TAT-10 project. From this sequence of

events, it appears that SLC's failure to secure appropriate authority from the German administration is the result of its conscious decision not to supply the necessary information required to complete its application.[19]

16. We also reject SLC's contention that the TAT-10 application violates the public interest requirements of the Communications Act.[20] SLC provides no support for its assertion that the TAT-10 project has defeated the Private Cable policy and both the SLC cable and MCI-BT cable projects. With respect to the Private Cable policy, the Commission has repeatedly emphasized that private cable projects are risk ventures that will succeed or fail on their own merits without any guarantee of common carrier traffic. It was never this Commission's intent in formulating the Private Cable policy to impede the continuing planning and construction of common carrier cable facilities.[21] We also note that AT&T's continued participation in common carrier cable projects did not defeat the PTAT private cable in the Atlantic or the NPC private cable in the Pacific. In fact, with the growing demand for digital cable facilities, AT&T has acquired capacity in both cable systems. Finally, we note that MCI and BT are owners of TAT-10. Neither has responded to SLC's claims that the decision to forego their planned cable system was the result of TAT-10. However, even if their decision to forego the cable system was the result of the planning of TAT-10, there is no basis to impute an improper motive merely because AT&T has continued to plan cables which results in the abandonment or postponement of some proposals for other cable systems. In fact, the inference could be drawn that MCI and BT's participation in TAT-10 is the result of a business decision that it would be more economical to invest in a cable system with costs spread among several owners as opposed to among two owners.

17. SLC also criticizes TAT-10 as containing no technological innovations or intra-cable restoration and involving serious antitrust concerns. Although technological innovation and restoration concerns are factors in considering the need for new cable facilities, these factors, standing alone, are rarely of decisional significance. Instead, the Commission places greater reliance on the actual need for the cable based on projected customer requirements. In a companion order authorizing the construction and operation of TAT-10, we have determined that TAT-10 is necessary in order to satisfy the increasing need for digital cable facilities. We also note that the technology employed on TAT-10 is the same new technology that TAT-9 will employ when it becomes operational in mid-February, 1992. Finally, SLC has failed to specify the nature of its antitrust concerns, other than its suggestion that AT&T's international business service and its submarine cable manufacturing business should be separate operations. Concerns with respect to the Commission's regulation of AT&T and whether its corporate structure should be changed are not properly before us in this proceeding.

18. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[22] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

19. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate TAT-10 (FCC 91-, adopted 1991, File No. I-T-C-91-135). In conjunction with the authorization of the TAT-10 Section 214 application and having fully considered the Petition to Deny, we find that this application requesting a cable landing license should be granted.

**Ordering Clauses**

20. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. §301 at 1052 (1985), to the applicants (AT&T, IDB International, HTC, MCII, TRT/FTC, US Sprint and Worldcom) a license to land and operate one high capacity digital submarine cable, having a capacity of 1680 Mbit/s (560 Mbit/s per pair), extending between Green Hill, Rhode Island, the United States and Norden, Germany and Alkmaar, Netherlands. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all relevant rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or

working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), CICI, Inc. d/b/a IDB International (IDB International), GTE Hawaiian Telephone Company (HTC), MCI International, Inc. (MCII), TRT/FTC Communications Corporation (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint), and World Communications, Inc. (Worldcom).

[2] On October 2, 1991, Joint Applicants supplemented their application by adding new owners and by attaching an amended map to reflect a change in the configuration of the system.

[3] Worldcom and US Sprint did not join in this reply.

[4] Letter from the German Ministry for Post and Telecommunications to Ambassador Bradley P. Holmes, Department of State, dated July 26, 1991.

[5] Letter from Robert E. Conn, counsel for SLC, to the Honorable Alfred C. Sikes, Chairman of the Federal Communications Commission (FCC), dated August 20, 1991.

[6] Letter from the German Ministry for Post and Telecommunications to the Honorable Alfred C. Sikes, Chairman of the FCC, dated October 16, 1991.

[7] Letter from Robert C. Conn, counsel for SLC, to the Honorable Alfred C. Sikes, Chairman of the FCC, dated October 21, 1991.

[8] A MIU, which is used for purposes of ownership allocation, is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party.

[9] SLC states that its petition also applies to the companion TAT-10 214 application and the TAT-11 applications.

[10] *Tel Optik Limited* (Private Submarine Cable), 100 F.C.C. 2d 1033 (1985).

[11] Worldcom and US Sprint did not join in this Reply.

[12] SLC argues that the fundamental premise of reciprocity applies irrespective of whether submarine cable circuits are owned end-to-end by one party or jointly owned.

[13] *See* n.4 *supra*.

[14] *See* n.5 *supra*.

[15] *See* n.6 *supra*.

[16] *See* n.7 *supra*.

[17] The Federal Communications Commission was delegated the responsibility of both processing applications and issuing licenses, subject to the proviso that the Commission may not grant or revoke licenses without first obtaining approval of the Secretary of State and any advice from any executive branch department of establishment of the Government as it may deem necessary. Executive Order No. 10530, May 10, 1954.

[18] Letter from Kenneth W. Bleakely, Senior Deputy U.S. Coordinator and Director for the Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (October 16, 1991).

[19] We also find SLC's argument concerning the potential for discrimination in tariff charges for terrestrial connecting facilities too speculative to address under the circumstances. SLC is concerned about such discrimination in the provision of terrestrial facilities when the record indicates that it has not even completed its application which would allow it to land the proposed cable in German territory.

[20] We note that public interest considerations separate from reciprocity concerns are not properly raised in the context of a cable landing license application. However, since SLC claims that its arguments should be applied to the Section 214 applications for both TAT-10 and TAT-11, we will dispose of its contentions here.

[21] *Tel Optik Limited* (Private Submarine Cable), 100 F.C.C. 2d at 1049; *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686, 2690, n.15 (Com. Car. Bur. 1987); *clarified*, 4 FCC Rcd 4454, 4455 (Com. Car. Bur. 1989). *Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Needs During the 1991-2000 Period*, 3 FCC Rcd 3979, 3989-90 (1988)(*North Atlantic Facilities Planning*).

[22] *See* Section 214 Application, File No. I-T-C-91-135, at p.12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC. d/b/a
IDB INTERNATIONAL
GTE HAWAIIAN
TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS
COMPANY LIMITED
PARTNERSHIP, and
WORLD COMMUNICATIONS, INC.

File No. SCL-91-002

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Extending Between the United States, the United Kingdom and France

**CABLE LANDING LICENSE**

**Adopted: December 19, 1991; Released: January 10, 1992**

By the Commission:

1. On May 28, 1991 seven United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned Joint Application[2] requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system known as TAT-11 Cable System (TAT-11), extending from the United States mainland to the United Kingdom and France. The application was placed on public notice on June 5, 1991. No comments were received.[3]

**The TAT-11 Cable System**

2. TAT-11 will land at Manahawkin, New Jersey in the U.S. and extend to Swansea, the United Kingdom and St. Hilaire, France. The proposed cable system consists of four segments. Segments A, B and C are, respectively, the cable station at Manahawkin, New Jersey; the cable station at Swansea, United Kingdom; and the cable station at St. Hilaire, France. Segment D is the whole of the submarine cable system linking Segments A, B and C.

3. TAT-11, comprised of three fiber pairs, will employ 1.55 micron laser technology operating at 560 Mbit/s on each working fiber pair. The capacity on each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 Minimum Investment Units (MIUs).[4] The transatlantic capacity of TAT-11 will be 252 MIUs per fiber pair. For voice services, digital circuit multiplication system (DCMS) can be employed to derive approximately 150 virtual voice paths from each MIU.

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. The telecommunications entities in the following locations will participate as owners: Belgium, Canada, France, Hong Kong, Ireland, Italy, Japan, Mexico, New Zealand, the Philippines, Portugal, Singapore, Spain, Switzerland, Taiwan and the United Kingdom.

5. Pursuant to our obligations under 47 U.S.C. §§34-39, the Department of State has been notified and, after having coordinated with the National Telecommunications and Information Administration and the Defense Information Systems Agency, has approved the landing of TAT-11 in the United States.[5]

6. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[6] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

7. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate TAT-11 (FCC 91-___, adopted ___ 1991, File No. I-T-C-91-136). In conjunction with the authorization of the TAT-11 Section 214 application and having found absent any reason to the contrary, we find that this application requesting a cable landing license should be granted.

**Ordering Clauses**

8. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. §301 at 1052 (1985), to the applicants (AT&T, IDB International, HTC, MCII, TRT/FTC, US Sprint and Worldcom) a license to land and operate one high capacity digital submarine cable, having a capacity of 1680 Mbit/s (560 Mbit/s per pair), extending between Manahawkin, New Jersey, the United States and St. Hilaire, France and Swansea, the United Kingdom. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all relevant rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), CICI, Inc. d/b/a IDB International (IDB International), GTE Hawaiian Telephone Company (HTC), MCI International, Inc. (MCII), TRT/FTC Communications Corporation (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint), and World Communications, Inc. (Worldcom).

[2] On June 17 and October 2, 1991, Joint Applicants filed amended cable system maps to reflect changes in the configuration and landing point of TAT-11.

[3] In the accompanying TAT-10 orders, a petition to deny was filed by Submarine Lightwave Cable Company (SLC) against the TAT-10 Cable Landing License, File No. SCL-91-001. According to the petitioner, the petition to deny was meant to address the TAT-11 Section 214 authorization and Cable Landing License applications as well. Without deciding the appropriate scope of SLC's petition, we note that SLC's arguments are addressed and the petition is denied in a companion order authorizing the Joint Applicants' cable landing license application for TAT-10.

[4] A MIU, which is used for purposes of ownership allocation, is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party.

[5] Letter from Kenneth W. Bleakely, Senior Deputy U.S. Coordinator and Director for the Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (October 16, 1991).

[6] *See* Section 214 Application, File No. I-T-C-91-136, at p.12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC. d/b/a/
IDB INTERNATIONAL
GTE HAWAIIAN
TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS
COMPANY LIMITED
PARTNERSHIP, and
WORLD COMMUNICATIONS

File No. I-T-C-91-136

Joint Application for Authorization
Under Section 214 of the
Communications Act of 1934, as
Amended, to Construct, Acquire Capacity
in and Operate a High Capacity Digital
Submarine Cable System between the United
States and the United Kingdom and France

## MEMORANDUM OPINION, ORDER AND AUTHORIZATION

**Adopted: December 19, 1991; Released: January 10, 1992**

By the Commission:

1. The Commission has under consideration the above-captioned Joint Application[1] filed on May 28, 1991 by American Telephone and Telegraph Company ("AT&T"), CICI, Inc. d/b/a/ IDB International, Inc. ("IDB International"), GTE Hawaiian Telephone Company ("HTC"), MCI International, Inc. ("MCII"), TRT/FTC Communications, Inc. ("TRT/FTC"), US Sprint Communications Company Limited Partnership ("US Sprint"), and World Communications ("Worldcom") (hereinafter collectively called the Joint Applicants). The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1982), to construct and operate a high capacity digital optic fiber submarine cable system, known as the TAT-11 Cable System (TAT-11), extending between Manahawkin, New Jersey in the United States on the west and Swansea, United Kingdom and St. Hilaire, France on the east. TAT-11 will be jointly owned by the Joint Applicants and nineteen foreign telecommunications administrations and carriers. The Joint Applicants propose that TAT-11 be operational by August 1993.

2. The Joint Applicants also seek authority to: (a) acquire capacity in the TAT-11 Cable System; (b) acquire, by lease or on an Indefeasible Right of User (IRU) basis, such extension facilities as may be required to extend capacity in TAT-11; (c) convey to its correspondents, or to non-owners, half interests in Minimum Investment Units (MIUs)[2] on an IRU basis; and (d) activate and operate capacity in TAT-11 and in the afore-mentioned extension facilities for the provision of their respectively authorized telecommunications services.

3. The Joint Application was placed on public notice on June 5, 1991. No comments were received.[3]

### I. APPLICATION

4. The Joint Applicants will use the TAT-11 Cable System to supplement their existing facilities providing the services which each is currently furnishing or which each may subsequently furnish.[4] TAT-11 capacity will be extended by suitable facilities to the borders of other TAT-11 Cable System participating countries or to other terminals of other international communications systems, including other cable terminals and satellite earth stations, enabling the provision of services between the United States, the United Kingdom and France, as well as to points beyond in both the east and the west.

5. The TAT-11 Construction and Maintenance Agreement (C&MA)[5], initialed on April 25, 1991, defines the proposed cable system on terms of segments for ownership purposes. TAT-11 will consist of four segments. Segments A, B and C are, respectively, the cable stations at Manahawkin, New Jersey (U.S.) on the west and Swansea, United Kingdom and St. Hilaire, France on the east. Segment D is the whole of the submarine cable system, provided between and among and including the System Interfaces at the cable stations in the United States, the United Kingdom and France. The System Interface is defined as the 140 Megabits per second (Mbits/s) digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities.

6. The transatlantic configuration of TAT-11 is based upon a three fiber pair system. TAT-11 will operate at a bit rate of 560 Mbits/s per fiber pair. The capacity on each of the three fiber pairs is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 MIUs. The transatlantic capacity of TAT-11 will be 252 MIUs per fiber pair. For voice services, digital circuit multiplication systems can be employed to derive approximately 150 virtual voice paths from each MIU.

7. The estimated total cost of TAT-11 is $280 million. The Joint Applicants' share of costs is $126.96 million and the proportion of that total allocated to each U.S. owner is based upon the ownership percentage interests contained in Appendix 1. The estimated total costs do not include the U.S. carriers' costs for interest during the construction, currently projected at $12.9 million for the cable system. Nor do these estimated costs include the cost of circuit multiplication equipment as such equipment is not considered part of the cable system. The fixed costs (98%) include the sub-system and cable activities, repeaters, acceptance tests and terminal equipment. Owners' costs (2%) include the route survey, project administration and inspection. There are no supplier's cost-incurred items. The estimated original capital cost per half MIU is $278,000 over the life of the cable without multiplexing.

8. As indicated in Appendix 1 (Schedule B of the C&MA), the Joint Applicants' collective ownership interest in TAT-11 is 45.2%. Appendix 2 (Schedule C of the C&MA) shows allocation of capital, operating and maintenance costs of Segments A, B, and C of TAT-11. Appendices 3A, 3B and 3C (Schedules D-1, D-2 and D-3 of the C&MA) show the capacity in TAT-11 that is assigned to each of the owners, upon which costs are based.[6] These capacity assignments contemplate each Joint Applicant's proposed utilization of circuit multiplication equipment. Both prior and subsequent to the System Ready for Customer Service (RFCS) date (August 1993), carriers, including non-owners of the TAT-11 Cable System, may acquire TAT-11 capacity by IRU, lease or other mutually agreed upon arrangements.

9. The Joint Applicants state that the placing into service of the TAT-10 Cable System (File No. I-T-C-91-135) is expected to be followed by a rapid increase in demand for reliable, secure, and economically-priced telecommunications services based upon digital lightwave technology which has resulted in the total forecasted utilization of the TAT-10 Cable System; in addition, recent political events in Eastern Europe and within Germany have created an unprecedented traffic demand to Europe, one which is expected to increase further. The Joint Applicants note that the reliability of telecommunications services and their usefulness to customers is in part a function of the availability of comparable facilities for diverse routing and service restoration. In further support of their application, the Joint Applicants point out that the Commission, in the *TPC-4 Order* [7], indicated that competitive conditions conditions, the elimination of circuit loading guidelines, and the implementation of price cap regulation of AT&T, have made it appropriate to give U.S. international carriers wider latitude in determining what facilities to construct and when to place such facilities in service. The Joint Applicants also contend that TAT-11 will be able to provide dedicated capacity for restoration purposes to restore other cable systems in the Atlantic and adjoining regions, primarily in connection with the TAT-10 cable system. According to Joint Applicants, all of the above factors serve to ensure that TAT-11 is in the public interest.

## II. DISCUSSION

10. The Joint Applicants seek authority to construct and operate the digital TAT-11 cable system to begin service in late 1993 to meet their telecommunications capacity needs and those of their correspondents in the Atlantic Ocean Region (AOR) during the 1993-1997 time frame. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended, and conclude that implementation of TAT-11 in 1993 will serve the public interest. Accordingly, we grant the Joint Application subject to certain conditions.[8]

### A. The Need for the TAT-11 Cable System

11. Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested. The standard we employ is "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[9] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[10]

#### 1. Demand and Capacity

12. Under the traditional form of demand analysis that we have applied in authorizing the construction and operation of submarine cable systems, we conclude that projected circuit demand, along with other factors, supports the operation of TAT-11 in 1993 to meet the telecommunications needs of the Joint Applicants and their correspondents in the AOR during the 1993-1995 time frame. The Commission has recognized that user demand is determined not only by the need for raw transmission capacity, but also by such user requirements as digital technology, route and media diversity, digital cable restoration capability, security and cost-effectiveness.

13. The Joint Applicants have provided their forecasted circuit demand for TAT-11[11], which is scheduled to be placed in operation in 1993. In 1993, the Joint Applicants project a need for 14,648 half-MAUOs[12]. Of this total 8,324 will be routed via TAT-9, resulting in 81% of TAT-9's capacity being utilized. The Commission has traditionally recognized that an 80% fill rate on a given facility is sufficient to justify the construction of additional facilities. In 1993, 4,325 digital cable circuits are projected to be routed via TAT-10, resulting in approximately a 41% utilization of the U.S. owners' share (10,590 MAUOs) of TAT-10 capacity. The remaining 1,999 digital cable circuits projected for 1993 would be routed over TAT-11, resulting in a 21% fill rate for that cable. If the circuits projected for use on TAT-11 were routed on TAT-10, the fill rate for TAT-10 would increase to approximately 60% of the Joint Applicants' ownership share of capacity. It is unlikely that the Joint Applicants' ownership share in TAT-10 facilities could be substantially increased.[13] In 1994, the combined demand for digital cable facilities to be routed over TAT-10 and TAT-11 would be 10,156 or approximately 96% of the Joint Applicants' ownership of TAT-10 capacity. Based on the projected growth in demand for digital cable facilities the only question is when TAT-11 will be required. Using the Commission's traditional 80% fill rate to determine the need for new facilities, a new cable facility would be required by 1994. Thus, although the Joint Applicants' total demand for digital cable facilities could be satisfied in 1993 via TAT-10 alone, we find that introduction of TAT-11 in 1993 is supported by those additional-factors discussed below.

#### 2. Quality of Service

14. *Media and Route Diversity.* We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.[14] Media diversity enhances service reliability through the use of more than one transmission medium, satellite or cable, to carry a correspondent's traffic. As a result, an increase in media diversity protects against the systemic failure of one medium. Route, or path, diversity enhances service reliability by increasing the number of independent routes that carry traffic to a given location. It is closely related to the ability to restore circuits in case of a facility failure. As a rule, the more independent routes serving a given loca-

tion, the greater the ability to restore one that fails. Thus, an increase in route or path diversity is the natural consequence of the introduction of another facility into a region.

15. We conclude that the introduction of TAT-11 as proposed will enhance route diversity by adding another independent cable route. Service reliability would be improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to restore service via another digital cable facility would be enhanced.

16. With respect to media diversity, as of December 31, 1990 the Joint Applicants were providing a total of 29,487 circuits, consisting of 20,255 submarine cable and 9,232 satellite circuits to the countries and territories initially proposed to be served by TAT-11. While the Commission has never specified what a preferable cable/satellite ratio would be, the traditional approach to the concept of media diversity is that too much traffic over a particular medium could result in a significant disruption of traffic should that medium suffer an outage. Since a significant percentage of traffic in the AOR is routed via cable facilities in addition to satellite facilities, the failure of any one cable system would not likely result in a significant disruption in service since restoration could be effected through use of other cable facilities in addition to the satellite facilities.

17. *Restoration*. Restoration pertains to the ability to maintain service in the event of a facility outage. TAT-11 will provide restoration capability for AOR facilities in general, and particularly the digital TAT-8, TAT-9 and TAT-10 cable systems. The Commission has previously recognized that, although satellite capacity provides a satisfactory restoration alternative for cable, absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements that may best be accommodated by fiber optic cable facilities.[15]

18. The introduction of TAT-11 in 1993 to accommodate demand for digital cable facilities would provide an additional restoration alternative. In 1993, the in-service date of TAT-11, both TAT-8 and TAT-9 will be effectively filled. As a result, there would be no digital cable facility available for the restoration of TAT-10. TAT-11 would also provide a viable restoration alternative for TAT-8 and TAT-9 since the fill rate for TAT-10 would have already reached 41% by its second year of operation. Thus, TAT-11 would enhance service reliability since an additional digital fiber optic cable route would be available for restoration if digital services are disrupted by an outage.

**3. Cost Analysis**

19. The Joint Application estimates the total cost of TAT-11 to be $280 million, with the Joint Applicants' share projected to be $126.96 million and the capital cost per half-MIU $278,000. The estimated original capital cost of a 64 Kbit/s half-circuit (half-MAUO) is approximately $9,600. The Joint Application notes that the unit cost of a virtual voice path in TAT-11 will be further reduced through the addition and use of digital circuit multiplication technology. A comparison of the costs for previously authorized digital cable facilities in the AOR demonstrates that TAT-11 will continue the trend of providing increased capacity while reducing circuit costs. For example, the cost of a TAT-8 half-MAUO between the U.S. and U.K. is $22,200. The cost for a similar unit of capacity on TAT-9 differed depending on the landing point, with a $10,000 half-MAUO cost between the U.S. and the U.K., $13,000 between the U.S. and France and $14,000 between the U.S. and Spain. The estimated cost for a half-MAUO on TAT-10 is $10,000.

**4. Technological Innovations**

20. In determining the need for additional facilities in a region, the Commission typically considers to what extent the proposed facilities will introduce new technology. In some instances, the effect of introducing new technology in the region is compelling, such as introducing digital fiber optic technology for the first time. In other cases, the technological innovations may not be as significant, such as improvements in laser technology in an area where digital fiber optic technology is already available. In this case, the need for TAT-11 is based on projected demand for digital cable circuits and not solely on technological innovation. Digital fiber optic cable technology is already available in the AOR on the TAT-8 cable system. We note, however, that there have been improvements in digital cable technology since TAT-8. For example, TAT-8 employed 1.3 micron laser and 280 Mbit/s technology. TAT-9 improved on this technology by using 1.55 micron laser and 560 Mbit/s technology, which is the technology used on TAT-10. The cumulative effect of these improvements is twice the capacity and cheaper per circuit costs. The same technology will be employed on TAT-11.

**5. Competition Considerations**

21. We previously have recognized that the enhancement of both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[16] We find that introduction of TAT-11 will enhance intramodal competition in the AOR and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that introduction of TAT-11 will increase intermodal competition with INTELSAT and potential separate satellite system providers and thereby spur existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance, the economy and efficiency of their operations. The opportunity to choose among a range of facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

**6. International Comity**

22. Our decisions authorizing the construction and operation of transoceanic submarine cable systems historically have recognized that correspondent acceptance is an important public interest factor.[17] Nineteen foreign administrations and telecommunications entities from sixteen foreign locations have agreed that the TAT-11 system design and 1992 service date will meet the projected service needs of their customers. Thus, we conclude that TAT-11 will promote international comity.

**B. The Effect of Price Cap Regulation**

23. Having determined that there is a need for the introduction of the TAT-11 cable system in late 1992, we also note that current competitive conditions and regulatory approaches provide the Joint Applicants with the incentive to make rational economic decisions and not engage in unnecessary construction of facilities.[18] In our *TPC-4 Decision*, we stated that the price caps system of regulation is a disincentive for carriers to engage in the construction of unnecessary facilities since the burden of such investment would fall on stockholders and not ratepayers.[19] Thus, the Joint Applicants' decision on what facilities to construct and when to place such facilities in service should be based on these factors.[20]

## III. CONCLUSION AND ORDERING CLAUSES

24. In view of the foregoing, we find that the present and future public convenience and necessity require the construction of the TAT-11 Cable System, having a capcity of 1680 Mbit/s (560 Mbit/s per pair), to become operational in 1993.

25. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[21] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

26. Accordingly, IT IS ORDERED that, pursuant to Section 214, 47 U.S.C. §214 (1982), the application, File No. I-T-C-91-136, of the Joint Applicants (AT&T, IDB International, HTC, MCII, TRT/FTC, US Sprint and Worldcom) IS GRANTED, subject to the following terms, conditions, and limitations and the Joint Applicants are authorized to:

(a) construct and operate the TAT-11 Cable System as proposed herein;

(b) acquire and activate capacity in the TAT-11 Cable System, on an ownership basis, in accordance with the interests specified in Appendix 3;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the TAT-11 Cable System;

(d) utilize digital circuit multiplication systems (DCMS) to derive additional voice paths from the circuits (MIUs) authorized herein in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in TAT-11 and aforementioned extension facilities for the provision of the Applicants' authorized telecommunications services.

27. IT IS FURTHER ORDERED that Applicants other than AT&T are authorized to acquire, by lease, appropriate connecting facilities between the Manahawkin, New Jersey cable station and their respective operating offices in the United States.

28. IT IS FURTHER ORDERED that when a given Applicant seeks to acquire or transfer an ownership or IRU interest in the TAT-11 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

29. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the TAT-11 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

30. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accomodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to ensure the most efficient use not only of this cable system, but of all means of communications between the U.S. and the Atlantic Ocean Region.

31. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

32. IT IS FURTHER ORDERED that no Applicant, that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107,[22] herein shall dispose of any ownership interest in TAT-11 capacity it is authorized to acquire in any way without prior authorization by the Commission.

33. IT IS FURTHER ORDERED that the Joint Applicants shall include TAT-11 facility use in the monthly Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceeding month.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] The Joint Applicants supplemented their Section 214 Application by filing individual circuit activation figures under separate cover and under requests for confidentiality, pursuant to Sections 0.457 and 0.459 of the Commission Rules. On July 26, October 2 and October 22, 1991, Joint Applicants filed supplemental information, including revised Schedules to the Construction and Maintenance Agreement to reflect revised capacity assignments, ownership interests, system configuration and landing point.

[2] A MIU, which is used for purposes of ownership allocation, is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party.

[3] In the accompanying TAT-10 orders, a petition to deny was filed by Submarine Lightwave Company (SLC) against the TAT-10 Cable Landing License, File No. SCL-91-001. According to the petitioner, the petition to deny was meant to address the TAT-11 Section 214 authorization and Cable Landing License applications, as well. Without deciding the appropriate scope of SLC's petition, we note that SLC's arguments are addressed and the petition is denied in a companion order authorizing the Joint Applicants' cable landing license for TAT-10.

[4] Initially, all Applicants may not be certified to serve directly all countries or territories which the facilities covered by this Application are capable of serving. Each individual applicant proposing extension of its services into such territories by means of the TAT-11 Cable System facilities will seek such appropriate authorization as may be required when it proposes to activate the facilities.

[5] *See* Attachment B to the Joint Application (filed May 28, 1991).

[6] The total number of half-MIUs available to be assigned, which is 1008, is referred to as the Notional Capacity. The remaining capacity between the Notional Capacity and the total Design Capacity is referred to as the Restoration Capacity, and will be available for contribution toward transatlantic cable restoration. Notional capacity will not exceed 1008 half-MIUs until follow on transatlantic cables with sufficient restoration capacity for TAT-10 and TAT-11 Cable Systems are available.

[7] *American Telephone and Telegraph Co. et al.*, 4 FCC Rcd 8042 (1989).

[8] In a separate decision, we also grant the Joint Applicants' request for a cable landing license (File No. S-C-L-91-002) pursuant to the Cable Landing License Act.

[9] *AT&T et al., (TAT-7 Order)*, 73 F.C.C. 2d 248, 256 (1979).

[10] *See, e.g., AT&T et al. (TAT-9 Order)*, 4 FCC Rcd 1129, 1131 (Com.Car.Bur. 1988). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning)*, 102 F.C.C. 2d 353, 355 (1985).

[11] *See* n. 1 *supra*.

[12] A MAUO is an equivalent voice channel (circuit) operating at 64,000 bits per second with an additional 9,684,656 bits per second required for multiplexing for a total of 73,684,656 bits per second in each direction at the System Interface locations. 30 MAUOs are the equivalent of 1 MIU.

[13] TAT-10 is fully subscribed and any increase in capacity for U.S. carriers' needs would, in all likelihood, require foreign administrations to surrender their interests in order to allow service to other locations.

[14] *See North Atlantic Facilities Planning*, 3 FCC Rcd 3979, 3986 (1988); *All America Cable and Radio Inc., et. al.*, 67 F.C.C. 2d 451, 469 (1978).

[15] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3987.

[16] *Id.* at 3989.

[17] *See id.* at 3989.

[18] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*Price Caps Order*).

[19] *See American Telephone & Telegraph, et. al.*, 4 FCC Rcd 8042, 8045 (1989) (TPC-4 Decision).

[20] *Id.* at 8046.

[21] *See* Section 214 Application, File No. I-T-C-91-136, at p.12.

[22] *See International Competitive Carrier*, 102 F.C.C. 2d 812, 822 (1985).

APPENDIX 1

SCHEDULE B
29-Oct-91

OWNERSHIP INTEREST IN THE TAT-11 CABLE SYSTEM

| PARTIES | | PERCENT |
|---|---|---|
| BT | (UK) | 7.43243 |
| BTE | (Ireland) | 1.46396 |
| CPRM | (Portugal) | 0.33784 |
| FT | (France) | 14.86486 |
| ITC | (Italy) | 1.23874 |
| MCL | (UK) | 20.83333 |
| RTT | (Belgium) | 0.90090 |
| SPTT | (Switzerland) | 1.35135 |
| TLFN | (Spain) | 0.78829 |
| AT&T | | 31.41892 |
| HKTI | (Hong Kong) | 1.12613 |
| HTC | | 0.11261 |
| IDB | | 0.33784 |
| IDC | (Japan) | 0.45045 |
| ITDC | (Taiwan) | 0.22523 |
| ITJ | (Japan) | 0.67568 |
| KDD | (Japan) | 0.56306 |
| MCII | | 7.65766 |
| PLDT | (Philippines_ | 0.33784 |
| TAS | (Singapore) | 0.45045 |
| TLGB | (Canada) | 1.46396 |
| TLMX | (Mexico) | 0.11261 |
| TNZI | (New Zealand) | 0.11261 |
| TRT/FTC | | 1.57658 |
| USSP | | 3.94144 |
| WCOM | | 0.22523 |
| TOTAL | | 100.00000 |

APPENDIX C

SCHEDULE C
29-Oct-91

ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS
OF SEGMENTS A, B, AND C OF THE TAT-11 CABLE SYSTEM

| PARTIES | SEGMENT A (PERCENT) NOTE 1 | SEGMENT B (PERCENT) NOTE 2 | SEGMENT C (PERCENT) NOTE 3 |
|---|---|---|---|
| BT | 0.67568 | 20.25723 | 0.00000 |
| BTE | 0.45045 | 3.51698 | 0.00000 |
| CPRM | 0.00000 | 0.00000 | 2.25564 |
| FT | 8.10811 | 0.00000 | 72.18044 |
| ITC | 0.00000 | 0.00000 | 8.27068 |
| MCL | 4.72973 | 52.73312 | 0.00000 |
| RTT | 0.00000 | 1.60772 | 2.25564 |
| SPTT | 0.90090 | 0.00000 | 6.01504 |
| TLFN | 0.00000 | 1.92926 | 0.75188 |
| AT&T (NOTE 4) | 46.84682 | 19.93569 | 6.76692 |
| HKTI | 2.25225 | 0.00000 | 0.00000 |
| HTC | 0.22523 | 0.00000 | 0.00000 |
| IDB | 0.67568 | 0.00000 | 0.00000 |
| IDC | 0.90090 | 0.00000 | 0.00000 |
| ITDC | 0.45045 | 0.00000 | 0.00000 |
| ITJ | 1.35135 | 0.00000 | 0.00000 |
| KDD | 1.12613 | 0.00000 | 0.00000 |
| MCII | 15.31532 | 0.00000 | 0.00000 |
| PLDT | 0.67568 | 0.00000 | 0.00000 |
| TAS | 0.90090 | 0.00000 | 0.00000 |
| TLGB | 2.92793 | 0.00000 | 0.00000 |
| TLMX | 0.22523 | 0.00000 | 0.00000 |
| TNZI | 0.22523 | 0.00000 | 0.00000 |
| TRT/FTC | 3.15315 | 0.00000 | 0.00000 |
| USSP | 7.43243 | 0.00000 | 1.50376 |
| WCOM | 0.45045 | 0.00000 | 0.00000 |
| TOTAL | 100.00000 | 100.00000 | 100.00000 |

APPENDIX

Notes to Schedule C
Page 1 of 1

NOTES:

1. The percentages shown on Schedule C for Segment A are derived from Schedule D-3 based on the relevant Western Access Party half MIU assignments divided by the Notional Capacity shown on Schedule D-3.

2. The percentages shown on Schedule C for Segment B are derived from Schedule D-1 based on the relevant Lyme Bay Access Party half MIU assignments divided by the Notional Capacity shown on Schedule D-1.

3. The percentages shown on Schedule C for Segment C are derived from Schedule D-2 based on the relevant St. Hilaire Access Party half MIU assignments divided by the Notional Capacity shown on Schedule D-2.

4. For the purpose of this agreement TPCI shall own the percentage listed against AT&T/TPCI for the portion of Segment D of the TAT-11 Cable System within France and the U.K. and their territorial waters through which the cable system traverses. AT&T shall own the percentage listed against AT&T/TPCI for the remainder of Segment D.

SCHEDULE B-1
29-Oct-91

TAT-11 CABLE SYSTEM
NIUS ASSIGNED FOR JOINT USE BY THE PARTIES OF THIS AGREEMENT
BETWEEN MANAHAWKIN AND SUNNSEA

| SUNNSEA ACCESS PARTIES | MANAHAWKIN ACCESS PARTIES | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | AT&T | BT | BTE | MKTI | IDB | IOC | ITDC | ITJ | KDD | MCII | MCL | PLDT | TAS | TLDN | TRT/TTC | USSP | UCOM | TOTAL |
| AT&T | 62 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 62 |
| BT | 21 | 3 | 0 | 0 | 0 | 0 | 1 | 2 | 3 | 21 | 0 | 1 | 0 | 0 | 3 | 0 | 0 | 55 |
| BTE | 4 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 11 |
| MCL | 84 | 0 | 0 | 10 | 3 | 1 | 1 | 2 | 2 | 12 | 21 | 0 | 3 | 4 | 0 | 11 | 1 | 156 |
| MTT | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 5 |
| TLDN | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 6 |
| TOTAL | 174 | 3 | 2 | 10 | 3 | 1 | 2 | 4 | 5 | 41 | 21 | 1 | 3 | 6 | 12 | 22 | 1 | 311 |

SCHEDULE B-2
29-Oct-91

TAT-11 CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BY THE PARTIES OF THIS AGREEMENT
BETWEEN MAMAMAKIN AND ST. HILAIRE

MAMAMAKIN ACCESS PARTIES

| ST. HILAIRE ACCESS PARTIES | AT&T | FT | HTC | IDC | ITJ | MCII | PLDT | SPTT | TAS | TLGH | TLHK | TNZI | VRT/FTC | USSP | WCOM | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| AT&T | 9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 9 |
| CPMH | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 2 |
| FT | 21 | 36 | 1 | 2 | 2 | 21 | 1 | 0 | 1 | 4 | 0 | 0 | 2 | 0 | 1 | 91 |
| ITC | 2 | 0 | 0 | 1 | 0 | 5 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 2 | 0 | 12 |
| NTT | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 3 |
| SPTT | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 0 | 0 | 0 | 1 | 0 | 2 | 0 | 8 |
| TLFN | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 2 | 0 | 3 |
| USSP | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 2 |
| TOTAL | 34 | 36 | 1 | 3 | 2 | 27 | 2 | 4 | 1 | 7 | 1 | 1 | 2 | 11 | 1 | 133 |

SCHEDULE B-3
29-Oct-91

TAT-11 CABLE SYSTEM
NIUS ASSIGNED FOR JOINT USE BY THE PARTIES OF THIS AGREEMENT
BETWEEN MANAHAWKIN, SWANSEA, AND ST. HILAIRE

WESTERN ACCESS PARTIES

| EASTERN ACCESS PARTIES | AT&T | BT | BTE | FT | HKTI | HTC | IDB | IDC | ITDC | ITJ | KDD | MCII | MCL | PLDT | SPTT | TAB | TLDB | TLNK | THZI | TRT/FTC | USSP | VDDH | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| AT&T | 71 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| BT | 21 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 2 | 3 | 21 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| BTE | 4 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| CPRM | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| FT | 21 | 0 | 0 | 36 | 0 | 1 | 0 | 0 | 0 | 2 | 0 | 21 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| ITC | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| MCL | 84 | 0 | 0 | 0 | 10 | 0 | 3 | 1 | 1 | 2 | 2 | 12 | 21 | 0 | 0 | 1 | 4 | 0 | 0 | 0 | 2 | 0 | [illegible] |
| NTT | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| SPTT | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| TLFN | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | [illegible] |
| USSP | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | [illegible] |
| TOTAL | 208 | 3 | 2 | 36 | 10 | 1 | 3 | 4 | 2 | 4 | 5 | 68 | 21 | 3 | 4 | 4 | 13 | 1 | 1 | 14 | 33 | 2 | 434 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC. File No. I-T-C-92-021

Application for authority to acquire and operate facilities in the Asean Optical Fiber Submarine Cable Network (AOFSCN).

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: December 31, 1991; Released: January 9, 1992**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-021 IS GRANTED, and GTE Hawaiian Telephone Co., Inc. is authorized to acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate six circuits in the Brunei-Malaysia-Philippines (BMP) segment, the Kuantan-Kota-Kinabalu (KK-KTN) segment and the Malaysia-Thailand (MT) segment of the AOFSCN and activate the six half-circuits in TPC-3 and G-P-T cables for the provision of its regularly authorized services between Hawaii and Thailand and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-92-02

Application for authority to acquire and operate facilities for direct service between the U.S. and Romania

Application for authority to acquire and operate facilities for direct service between the U.S. and Egypt — File No. I-T-C-92-028

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: December 31, 1991; Released: January 9, 1992**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Romania and Egypt by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-027 and I-T-C-92-028 ARE GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 66 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Romania and Egypt furnished by US Sprint's correspondents in Romania and Egypt;

b. lease from AT&T and operate 66 voice-grade circuits in the Etam, West Virginia earth station;

c. lease from AT&T and operate 66 voice-grade circuits between the Etam, West Virginia earth station and US Sprint's operating center in New York; and

d. use said facilities to provide US Sprint's regularly authorized services, including switched voice services, between the U.S. and Romania (24 circuits) and Egypt (42 circuits) and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between the applicant and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of the Applications of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-030

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Southbury, Connecticut ground earth station (WA-28) facilities with Inmarsat Standard M and Standard B Network Coordination Stations and the related control and channelization equipment necessary for the provision of Inmarsat Standard M and Standard B capability and to provide Inmarsat Standard M and Standard B services in the Atlantic Ocean Region-East and in the Atlantic Ocean Region-West

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-031

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Santa Paula, California ground earth station (KB-34 and KA-31) facilities with Inmarsat Standard M and Standard B Network Coordination Stations and the related control and channelization equipment necessary for the provision of Inmarsat Standard M and Standard B capability and to provide Inmarsat Standard M and Standard B services in the Pacific Ocean Region

## MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

**Adopted: December 30, 1991; Released: January 9, 1992**

By the Chief, International Facilities Division:

1. On November 1, 1991, the Communications Satellite Corporation (Comsat), through its Comsat Mobile Communications Division, filed the above-captioned applications requesting authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978, 47 U.S.C. § 753(c), and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to upgrade its Southbury, Connecticut and Santa Paula, California ground earth station facilities with Inmarsat Standard M and Standard B Network Coordination Stations (NCSs) and the related control and channelization equipment necessary for the provision of Inmarsat Standard M and Standard B capability and to provide Inmarsat Standard M and Standard B communications services in the Atlantic Ocean Region-East (AOR-E), Atlantic Ocean Region-West (AOR-W) and Pacific Ocean Region (POR). Comsat requests authority to provide Inmarsat Standard M and B maritime satellite service and certain international land mobile satellite services (LMSS). The applications were placed on public notice on November 6, 1991. No petitions or comments were received. For the reasons set forth below, we grant the applications insofar as they request authority for maritime services, subject to certain conditions. We defer consideration of the use of Inmarsat Standard M and B for LMSS pending Commission action on Comsat's application File No. I-T-C-91-139.

2. Comsat seeks authority to install the NCSs and control and channelization equipment at Southbury and Santa Paula necessary for the provision of voice frequency and telegraph transmission facilities for access to Inmarsat space segment. Comsat describes Inmarsat Standard B as an all-digital system that preserves the signal quality standards and reliability of Standard A service, while consuming less satellite power and bandwidth per voice channel. According to Comsat, this will result in reduced communications charges and an improved grade of service. Comsat's Inmarsat Standard B will include telephony using 16 Kbps digital voice coding, telex, duplex and simplex, digital facsimile at 9.6 Kbps, and data at speeds of up to 9.6 Kbps. In the future, Comsat expects to offer credit card operation for telephony, 9.6 Kbps telephony, 14.4 and 16 Kbps data, and shore-to-ship simplex group calls. With a somewhat larger ship earth station antenna, Inmarsat Standard B service will include high-speed data at 64 Kbps and above and high-quality television.

3. Comsat states that Inmarsat Standard M is based on low-cost lightweight mobile earth stations offering 4.8 Kbps voice and low speed (2400 bits per second) data/facsimile services. Inmarsat Standard M services will include direct dial telephone interconnection with the fixed public switched telephone network (PSTN) using 6.4 Kbps digital voice coding, direct dial and auto answer Group 3 facsimile interconnected with the PSTN, circuit switched duplex data via the PSTN or public switched data networks, and voice, data, and facsimile group call services which allow a single transmission to be received by many users belonging to assigned groups.

4. Comsat states that the NCSs will be responsible for coordinating all Inmarsat control and access activities between all coast earth stations and ship earth stations in the POR, AOR-E and AOR-W. The NCS equipment is composed of a control processing unit, a monitor and control subsystem, common equipment, C-band communications equipment, and L-band equipment. For the provision of Inmarsat Standard M and B services, Comsat will also add channelization equipment to provide the voice frequency and data transmission facilities for access to Inmarsat's space segment and access and control equipment which includes redundant processors containing the stored program and associated CRT consoles. The cost of the equip-

ment required for the AOR-E and AOR-W NCS is estimated to be $4.1 million and for the POR NCS $2.1 million. The cost of the control and channelization equipment at Southbury is estimated to be $6 million and at Santa Paula $5 million. The total cost of the upgrade at Southbury is estimated to be $10.1 million and at Santa Paula $7.1 million. Comsat states that Inmarsat Standard M and B service will be available pursuant to cost-based tariffs which Comsat will file with the Commission in the near future.

5. Comsat states that the operation of the Standard M and B NCSs and the equipment described above will enable the assignment of space segment capacity to users on a demand basis and will ensure more efficient use of the Inmarsat system. Grant of these applications will also permit the orderly introduction of Inmarsat Standard M and B service, thereby greatly extending the advantages and reliability of satellite communications to a host of new users. Comsat also claims that Inmarsat Standard M service will provide maritime satellite safety communications links for a large number of smaller vessels that otherwise could not realize this benefit. Comsat adds that the unit cost of mobile communications will be reduced and U.S. competitiveness will be enhanced.

6. We conclude that it will be in the public interest to allow Comsat to provide Inmarsat Standard M and B service. Inmarsat Standard M and B service will make available to some maritime users a type of communication not previously available. The record in this proceeding fails to demonstrate any reason for denial of these applications. Furthermore, we believe that U.S. policy should be designed to ensure timely and effective U.S. entry into the markets for new services. We conclude that this goal will be furthered by grant of the instant applications.

7. Comsat also asks to provide Inmarsat Standard M and B international LMSS to land-based mobile terminals in foreign countries via the Inmarsat first and second generation satellites. The international LMSS would include communications within and between foreign countries excluding North America and communications between fixed points in North America and mobile terminals located outside of North America. In a related proceeding, File No. I-T-C-91-139, Comsat has requested blanket authority to provide international LMSS via the Inmarsat system and its regularly authorized ground earth stations. Because the issue of Inmarsat use for international LMSS will be considered in File No. I-T-C-91-139, we need not here address Comsat's request to provide Inmarsat Standard M and B international LMSS. We therefore defer action on that portion of Comsat's application that requests authority to provide Inmarsat Standard M and B international LMSS to File No. I-T-C-91-139.

8. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c), IT IS ORDERED that the applications of the Communications Satellite Corporation, File Nos. I-T-C-92-030 and I-T-C-92-031, ARE GRANTED IN PART and Comsat is authorized to provide Inmarsat Standard M and B satellite services described herein in the Atlantic Ocean Region-East, Atlantic Ocean Region-West and Pacific Ocean Region and to upgrade the Southbury, Connecticut, ground earth station (WA-28) and Santa Paula, California, ground earth stations (KB-34 and KA-31) with Inmarsat Standard M and B Network Coordination Stations and the related control and channelization equipment necessary for the provision of Inmarsat Standard M and Standard B capability.

9. IT IS FURTHER ORDERED that Comsat's request to provide international LMSS via Inmarsat is deferred and will be considered in Application File No. I-T-C-91-139.

10. IT IS FURTHER ORDERED that Comsat shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, file a tariff for the services authorized in this order before offering services to the public.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MIDWEST CABLE AND SATELLITE, INC. File No. I-T-C-92-026

For authority pursuant to Section 214 of the Communications Act to extend its satellite transmission/reception services to include services between the U.S. and Canada and Mexico, using U.S. and non-U.S satellites.

## MEMORANDUM OPINION, ORDER AND AUTHORIZATION

**Adopted: December 30, 1991; Released: January 10, 1992**

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned uncontested[1] application seeking authority under Section 214 of the Communications Act of 1934, as amended, to provide transborder services via U.S. domestic, Canadian and Mexican satellites between the U.S. and Canada and Mexico. We find that a final grant of the application is in the public interest.

2. Midwest Cable and Satellite, Inc. (MCS) is a domestic, non-dominant common carrier presently offering various television programming distribution and reception, video conferencing, and occasional use video services through the operation of a Ku-band earth station in Minneapolis, Minnesota. Additionally, MCS has been authorized to provide C-band television services domestically and between the U.S. and transborder locations in Mexico and Canada. By the present application MCS requests authority to extend its Ku-band earth station services to include the transmission and reception of television programming between the U.S. and Canada and Mexico using satellite systems that have been consulted for transborder services under Article XIV(d) of the INTELSAT Agreement.

3. MCS' application requests authority to provide services identical to those previously authorized under the Commission's transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement for the satellites it intends to utilize. We have previously recognized that where an application involves the extension of existing or planned domestic networks to provide video or business services between the United States and Canada and Mexico using U.S. domestic satellites, as well as the Anik and Morelos satellites, the grant of transborder authority is consistent with the Commission's Transborder policy.[2] In such cases we have determined that use of the INTELSAT system would be both clearly impractical and uneconomical.[3] In addition, we find here that MCS' request is in accord with current INTELSAT Article XIV(d) consultations and therefore will cause neither technical interference nor significant economic harm to the global system.

4. Accordingly, IT IS ORDERED that application File No. ITC-92-026 IS GRANTED, and MCS is authorized to establish channels of communication with U.S. satellites listed in Attachment 1, as well as the Anik and Morelos satellites listed in Attachment 2, to provide transmission and reception of television programming between the U.S. and Canada and Mexico, consistent with Attachments 1 and 2.

5. IT IS FURTHER ORDERED that any earth stations used by MCS to establish channels of communications with non-U.S. satellites for transborder service must be authorized under Title III of the Communications Act, as amended, for such communications.

6. IT IS FURTHER ORDERED that no final authority will be granted for communication with the Anik E-A or Anik E-B satellites until MCS submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

7. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

8. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained or where the U.S. Government has determined that appropriate copyright protection does not otherwise exist.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.1115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

### FOOTNOTES

[1] The application was placed on public notice on November 6, 1991. No comments were received.

[2] *See* Transborder Satellite Video Services, 88 FCC 2d 258, 280 (1981) (Duplication of services over INTELSAT would involve terrestrial links or multi-hop satellite connections, increase costs and result in an inefficient use of the available radio spectrum); Satellite Business Systems, 88 FCC 2d 195 (1981) (Commission authorized the provision of two-way business communications between the U.S. and Canada where the extension of an existing U.S. domestic network was involved). *See also*, Eastern Microwave, Inc., *et al.*, File Nos. I-T-C-84-095 *et al.*, Mimeo No. 6425, released September 11, 1984 (application of Atlantic Teleport Company); RCA American Communications, Inc., *et al.*, File Nos. I-T-C-86-002, *et al.*, Mimeo No. 2578, released February 14,

1986 (application of Upsouth Corp); National Cable and Satellite Corp., *et al.*, File Nos. 417-DSE-ML-86, et al., Mimeo No. 5220, released June 20, 1986 (application of Satellite Transmission and Reception Specialists).

[3] *Id.*

## ATTACHMENT 1

### U.S. Satellites Consulted Pursuant to Article XIV(d)

**Satellites**

*AURORA (SATCOM C-5)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR IV
SATCOM IR
SATCOM IIR
*SATCOM C-1
*SATCOM C-3
*SATCOM C-4
SATCOM IV
SATCOM K-1
SATCOM K-2
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

* Consulted for service between the U.S. and Canada only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION (see note 5)

| Country | Service[s] | Satellite[s] |
|---|---|---|
| Anguilla | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Antigua and Barbuda | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Bahamas | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Barbados | T.V. receive-only | all Galaxy, Satcom and Westar satellites listed in Attachment 1 |
| Belize | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Bermuda | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| British Virgin Islands | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Canada | reception of T.V. programming; occasional point-to-point video services; business services including data and electronic document distribution, video teleconferencing and voice communications | all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2, E-A and E-B (see note 4) |
| Cayman Islands | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Dominica | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Grenada | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Grenadines | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Mexico | incidental reception of video and audio programming; occasional use T.V.; business services including data and electronic document distribution video teleconferencing and voice communications | all satellites listed in Attachment 1 plus the Morelos I and II satellites |

| | | |
|---|---|---|
| Monsterrat | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Netherlands Antilles | T.V. receive-only | Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D-4 |
| St. Christopher-Nevis | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| St. Lucia | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| St. Vincent | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Turks & Caicos | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Venezuela | T.V. receive-only data receive-only | all satellites listed in Attachment 1 |

**Notes**

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

5) This chart updates and supersedes previous charts listing countries, services and satellites consulted with INTELSAT for the provision of transborder services. The chart is current as of October 1989 and incorporates the most recent consultations approved by the INTELSAT Assembly of Parties in AP-15-3E (See AP-15-23E, AP-15-24E, AP-1534E).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| AT&T | Transmittal Nos. 3380, |
| COMMUNICATIONS | 3537, 3542, and 3543 |

Revisions to Tariff F.C.C. No. 1

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 19, 1991; Released: December 19, 1991**

By the Chief Common Carrier Bureau:

## I. INTRODUCTION AND BACKGROUND

1. On August 16, 1991, AT&T filed Transmittal No. 3380, which modifies the terms and conditions of the Call Home and Card Options of AT&T's Block-of-Time (Reach Out America) optional calling plan (OCP). Under Transmittal 3380, only AT&T CIID/891 (CIID) cards will qualify for the OCP discounted pricing as of January 1, 1992.[1] On October 10, 1991, AT&T filed Transmittal No. 3537, limiting its Pro Wats OCP card discount to AT&T CIID card usage. On October 11, 1991, AT&T filed Transmittal No. 3542, limiting its Small Business OCP discount to AT&T CIID card usage, and filed Transmittal No. 3543, which similarly limits its Plan D Customer Network OCP discount to AT&T CIID card usage. In these tariffs, AT&T has tied retention of the customer's existing card option discount to use of the new AT&T CIID card.[2] AT&T will provide the new card to any customer that wants it. Under these transmittals, OCP customers who fail to use the AT&T CIID cards will be dropped as card option customers as of January 1, 1992, so that their next bill for calling card usage will be at the higher, nondiscounted rate. Transmittal 3380 is scheduled to become effective on December 20, 1991. Transmittal 3537 is scheduled to become effective on December 24, 1991. Transmittals 3542 and 3543 are scheduled to become effective on December 25, 1991

## II. PLEADINGS

### A. Petition

2. On September 3, 1991, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal No. 3380. [3] MCI claims that the proposed revisions will remove the tariff provisions that permit AT&T Block-of-Time Calling Plan customers who have the Call Home and Card Option plans to have any calling card other than the AT&T CIID calling cards qualify for inclusion in their OCP. Thus, MCI argues, AT&T is actually proposing "to discontinue, reduce, or impair service" currently being furnished to its customers in the absence of authority to do so under Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), and Section 63.60 *et seq.* of the Commission's Rules, 47 C.F.R. § 63.60 *et seq.* MCI Petition at 1-2.

### B. Reply

3. AT&T filed a reply on September 12, 1991 disputing MCI's characterization of its tariff revision as a discontinuance of service which requires prior certification under Section 214 of the Communications Act. AT&T explains that the revisions simply change the terms and conditions applicable to two AT&T calling plan options by requiring that customers who wish to have calling card calls qualify under these options bill them to an AT&T CIID calling card. AT&T Reply at 2. AT&T claims it is "merely eliminating a type of calling card which can be used to qualify for the discounts associated with the plans." *Id.* at 2-3. AT&T argues that at most, its proposed revisions could cause the loss of the discount, in other words, a rate change, for some customers, and that a change in rates has never been held to constitute a discontinuance of service requiring prior Commission authorization. *Id.* at 3, *citing* American Telephone and Telegraph Co. (Termination of TELPAK Service), 64 F.C.C. 2d 959, 965 (1977); Western Union Telegraph Co., 74 F.C.C. 2d 293, 295, 297 (1979). Finally, AT&T contends that its revision merely restricts an available billing arrangement, and that this is similar to the revisions AT&T has previously used to eliminate its dormitory billing arrangement in American Telephone and Company Co., Transmittal No. 1781, 4 FCC Rcd 8582 (Com. Car. Bur. 1989). AT&T notes that MCI opposed that tariff on the same prior certification grounds, and that its argument was rejected by the Bureau.

4. AT&T explains the need for the tariff revisions withdrawing existing OCP card discounts in a footnote, which states: "Due to contractual arrangements with the LECs, which become operational on January 1, 1992 -- the

---

[1] AT&T also performed the required Price Cap adjustments for Basket 1 and states that the new Actual Price Index falls below the Price Cap Index for Basket 1 and the new Service Band Indexes for Operator/Card Services, Reach Out America and Residence fall within the required limits.

[2] AT&T's CIID card is a so-called "proprietary" card. The term "proprietary" card is generally used in the industry to refer to cards the validation data for which is not made generally available to other carriers by the card-issuer. "Proprietary" cards can be contrasted with "joint use" cards. In Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rule Making, CC Docket No. 91-115, 6 FCC Rcd 3506 (1991) (*Joint Use Card NPRM*), the Commission defined "joint use" cards. LEC joint use cards were defined as cards which bear account numbers supplied by a LEC, are used for the services both of a LEC and an IXC, and are validated by access to data maintained by the LEC. *Id.* at n. 1. *See also* Cinncinnati Bell Telephone, Final Order, CC Docket No. 89-323, FCC 91-117, paras. 2 and 26 (released May 24, 1991). Pleadings filed in response to this Order should conform to this standard usage of the terms "proprietary" cards and "joint use" cards or fully explain any non-standard usage of these terms.

[3] No petitions were filed against Transmittal Nos. 3537, 3542, and 3543.

effective date of the proposed revisions, AT&T will be deprived of the ability to include calls billed to non AT&T CIID/891 calling cards on its optional calling plan bills. The proposed tariff revisions reflect this fact." *Id.* at 2 n. 3.

**C. Supplemental Information**

5. AT&T has met with Tariff Division staff several times since the filing of the subject transmittals to discuss the operation of its new card call processing system and its effect on OCP customers as of January 1, 1992. At the request of Tariff Division staff, AT&T filed a supplemental statement expanding upon AT&T's justification for the elimination of OCP pricing for non-AT&T CIID card usage. [4] In its oral presentations, as in its Supplemental Statement, AT&T explained (1) how calls made over AT&T's network are processed and billed today; (2) how those processes will change beginning January 1, 1992 and (3) why OCP discounted billing will be infeasible for calls placed with non-AT&T calling cards beginning on that same date. As to the latter point, AT&T has asserted both orally and in writing that there are "operational and technical reasons" why it cannot extend the OCP pricing to non-AT&T CIID cards after December 31, 1991. AT&T states that on that date, the Shared Network Facilities Agreements (SNFAs) between AT&T and the Bell Operating Companies (BOCs) relating to card processing expire. Under the SNFAs, AT&T owned the validation database, and the BOCs owned the systems which maintained and updated it. AT&T claims that as a result of the expiration of this shared arrangement, it had to redesign its entire process of handling a message billed to a calling card.

6. AT&T states that the decision to limit OCPs to calls charged to an AT&T CIID card was a decision which met AT&T's perceptions of what it could reasonably build in view of the technology and systems required to develop, maintain and process calling card calls, which are complicated "even without the added complexity of OCP billing," and also meet "marketing objectives." AT&T Supplemental Statement at 2. AT&T states further that the new card call processing system it developed only gives AT&T access to account data for its own cards, whereas in the shared environment, AT&T had access to account data for both AT&T and LEC cards. According to AT&T, under the new system the essential billing information cannot be collected at the right place or the right time to apply OCP pricing to LEC card calls. AT&T asserts that extensive and expensive changes would have to be made to both the AT&T and LEC systems in order to remedy this limitation, that in no event could these changes be accomplished by January 1, 1992, and, in addition, agreements between AT&T and the LECs would have to be renegotiated. AT&T ultimately maintains that technical difficulties associated with including card calls charged to LEC cards make their inclusion in the OCP discounts infeasible.

**III. DISCUSSION**

7. We agree with AT&T's contention that Transmittal No. 3380 is not a discontinuance of service for purposes of Section 214 of the Act. We have concluded, however, based on our review of the instant transmittals and the pleadings, that AT&T's tariff revisions raise other issues that warrant investigation. Under Transmittal 3380, AT&T has tied retention of an existing discount exclusively to use of the AT&T CIID card, and has prospectively limited the availability of REACH OUT to only AT&T CIID card users. The same is true with respect to AT&T's other CIID-related filings under Transmittals 3537, 3542 and 3543. In each case, OCP customers are to be charged different rates for what is otherwise the same service, depending on the type of card used for charging the call. Such apparent discrimination in the terms and conditions of service raise serious questions of compliance with the prohibition against unreasonable discrimination contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). The central question we will investigate in this docket is whether any such discrimination is reasonable.

8. To justify this transmittal, AT&T argues that the change-over to its new, proprietary card processing system will occur on January 1, 1992, and that its tariff revisions must be in place by then to reflect this fact. AT&T offers a two-pronged justification for withdrawal of existing card option discounts at that time: (1) contractual arrangements with the LECs and (2) technical and operational difficulties. We have reviewed AT&T's supporting documentation and find it insufficient. AT&T's description of its calling card processing system does not establish that continuation of the existing discounts is impossible nor is that conclusion consistent with information provided by the BOCs regarding the interoperation of their usage tracking systems and AT&T's. Based on the information now before us, we cannot resolve the factual inconsistencies and conflicts in AT&T's justification for these transmittals which would enable us to determine whether the apparent discrimination among card users introduced by these transmittals is reasonable. Therefore, we are instituting an investigation to obtain additional information from interested parties and to analyze the record further.

9. We have also concluded that the issues raised by these four transmittals are complex and warrant exercise of our discretion to suspend them for five months pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of new or changed offerings. In deciding whether to suspend, we have balanced the interests of ratepayers, the filing

[4] Letter from E. E. Estey to Chief, Tariff Division, Common Carrier Bureau, October 21, 1991. The Estey cover letter states that it transmits a document supplementing information relating to AT&T Transmittal 3380. The information by its nature also relates to Transmittals 3537, 3542, and 3543. AT&T has requested confidential treatment, pursuant to Sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457 and 0.459 and Section 552(c)(4) of the Freedom of Information Act, 5 U.S.C. § 552(c)(4), for portions of the statement containing (1) technical and marketing information concerning AT&T calling cards; (2) descriptions of the manner in which AT&T processes calling card calls made over the AT&T network; and (3) information about AT&T's evaluation of possible modifications to AT&T's system. We do not rule on AT&T's request for confidentiality at this time because we have not relied upon the affected written information in reaching our decision, nor do we disclose that information in this Order.

carrier, and the competitive process. We have determined that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittals, as well as the impact on existing card customers of the transmittals' elimination of existing discounts, outweighs the carrier's interest in the January 1, 1992 withdrawal of the OCP pricing proposed in Transmittals 3380, 3537, 3542, and 3543.

10. AT&T has attempted to justify the apparent discrimination in these tariffs on the grounds that: (1) it has entered into contractual arrangements with the LECs that deprive AT&T of the ability to continue to OCP pricing for non-AT&T CIID cards; and (2) there are technical and operational difficulties and limitations in its proprietary card call processing system.

In order to determine whether AT&T's justification for the discrimination introduced by these transmittals is valid, we require AT&T to answer the following questions:

A. What contractual arrangements with the LECs become operational on January 1, 1992 which affect AT&T's ability to continue to extend OCP pricing to non-AT&T CIID card usage? Who initiated the proposed contractual arrangements? Were reasonable alternatives explored or available? In what way do those contractual agreements affect AT&T's ability to continue OCP pricing for non-AT&T card usage?

B. Do technical and operational difficulties exist which affect AT&T's ability to continue to extend OCP pricing to non-AT&T CIID card usage? If so,

1. What are these difficulties?

2. Do alternative processes exist, in the interim period and for the long term, which would permit continued inclusion of non-AT&T CIID cards in OCPs?

C. AT&T has stated that the decision to create a new card call processing system, which, *inter alia*, lacks the ability to automatically extend OCP pricing to non-AT&T CIID card usage, was a business decision which was consistent with AT&T's capabilities and which met its marketing objectives. Is any rate discrimination made reasonable, and thus permissible under Section 202(a), if (1) the discrimination is an unavoidable product of decisions made by the carrier in the conduct of its business; and (2) the discrimination could have been avoided by the carrier if the carrier had chosen to modify the business decision which led to the discrimination?

11. AT&T may, of course, present any additional justifications for this rate disparity in its direct case if it chooses to do so.

## IV. PROCEDURAL MATTERS

12. This investigation will be conducted as a notice and comment proceeding. AT&T is designated as a party. AT&T shall file its direct case no later than January 30, 1992. The direct case shall present AT&T's position with respect to the issues described in this Order. Pleadings responding to the direct case may be filed no later than February 27, 1992, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." AT&T may file a "Rebuttal" to oppositions or comments no later than March 12, 1992.

13. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

14. *Ex parte* contacts, (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

15. All relevant and timely comments and reply comments will be considered by this Commission. In reaching a decision, the Commission may take into account information and ideas not contained in comments, provided such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

16. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

## V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation is instituted into the lawfulness of the tariff revisions filed by AT&T Communications, Inc. in Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543.

18. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the four instant tariff revisions filed by AT&T Communications, Inc. ARE SUSPENDED until May 14, 1992.

19. IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL FILE a supplement reflecting these suspensions no later than December 18, 1991. Special Permission No. 91-1106 is assigned for this purpose.

20. IT IS FURTHER ORDERED that the petition to reject AT&T Transmittal No. 3380 filed by MCI Telecommunications Corporation IS DENIED.

21. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| MIDWEST | File Nos. BALCT-910809KM |
| COMMUNICATIONS, INC. | BALH-910809KL |
| (Assignor) | BAL-910809KK |
| | BALCT-910809KN |
| | BALCT-910809KO |
| | BALCT-910809KP |
| | BALCT-910809KQ |

and

CBS INC.
(Assignee)

For Consent to the Assignment of
Licenses of Stations:
WCCO-TV, Minneapolis, Minnesota
WLTE(FM), Minneapolis, Minnesota
WCCO(AM), Minneapolis, Minnesota
KCCO-TV, Alexandria, Minnesota
KCCW-TV, Walker, Minnesota
WFRV-TV, Green Bay, Wisconsin
WJMN-TV, Escanaba, Michigan

## MEMORANDUM OPINION AND ORDER

**Adopted: December 19, 1991; Released: December 20, 1991**

By the Commission:

### INTRODUCTION

1. The Commission has before it for consideration the above-captioned applications for consent to the assignment of the television and radio broadcast licenses held by Midwest Communications, Inc. (Midwest) to CBS Inc. (CBS).[1] In view of the proposed common ownership of television and radio stations in Minneapolis, Minnesota, which is generally prohibited by the Commission's "one-to-a-market" rule,[2] CBS has requested a waiver of the rule pursuant to the *Second Report and Order* in MM Docket No. 87-7.[3] In addition, as the licensee of twelve FM radio stations, the maximum allowed under our national ownership rule, [4] CBS has requested an 18-month waiver of this rule so that it may acquire WLTE(FM) and retain its other FM radio stations until it can divest itself of one of its existing FM stations. We also consider here the proposal of CBS to continue operating stations KCCO-TV, KCCW-TV, and WJMN-TV as television "satellite" stations pursuant to the Commission's *Report and Order* in MM Docket No. 87-8.[5]

2. KVBM Television, Inc. (KVBM), permittee of television station KVBM-TV, Channel 45, Minneapolis, Minnesota, has filed a Petition to Deny against the assignment only of WCCO-TV, alleging that Section 73.635 of the Commission's Rules precludes grant of the application.[6] CBS and Midwest filed Oppositions against the petition. KVBM submitted a late-filed reply pleading.[7]

### ONE-TO-A-MARKET WAIVER

3. In the *Second Report and Order*, we set out standards for reviewing requests for waivers of the one-to-a-market rule. We concluded that we would look favorably upon one-to-a-market waiver requests involving radio and television station combinations located in a top 25 television market where there will be at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination. *Second Report and Order*, at 1751. In establishing the "Top 25 Markets/30 Voices" presumption, we stated that "[a]lthough liberalizing the radio-TV cross-ownership rule may affect diversity of ownership to some minimal degree even in markets with many separate licensees, we believe that any such effect must be weighed against the efficiency gains, cost savings, and other benefits of allowing such combinations." *Id.*, at 1752. In support of its waiver request, CBS notes that,

---

[1] The stations are currently held by subsidiary corporations controlled by Midwest. Pursuant to the agreement between the parties, Midwest filed, concurrently with the above applications, short-form applications (FCC Form 316) seeking Commission consent to the merger of the subsidiaries into Midwest. These *pro forma* applications were granted on August 27, 1991. According to the agreement, the mergers will occur immediately preceding the closing of the assignment transactions.

[2] 47 C.F.R. Sec. 73.3555(b).

[3] *Amendment of Section 73.3555*, 4 FCC Rcd 1741, (*"Second Report and Order"*), *recon. granted in part*, 4 FCC Rcd 6489 (1989).

[4] 47 C.F.R. Sec. 73.3555(d)(1)(ii).

[5] *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (*"Satellite Report and Order"* ) (*petitions for partial stay and reconsideration pending).*

[6] Other parties submitted Petitions to Deny which have since been dismissed. The Minneapolis Branch of the NAACP had filed a Petition to Deny against the assignment of the Minneapolis stations, challenging, among other things, the proposed waiver of the twelve-station ownership restriction. In addition, Joe Bornong, Julie Tigges, and Telecommunications Research and Action Center had filed a Petition to Deny against CBS's requests to waive the one-to-a-market rule and the twelve-station ownership provision. Pursuant to settlement agreements with CBS which were approved by the staff on December 11, 1991, these Petitions to Deny were dismissed. *See Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3915 (1990); 47 C.F.R. Sec. 73.3588. We must nevertheless consider the issues raised in those petitions. *Booth American Co.*, 58 FCC 2d 553 (1976).

[7] Because it does not appear that the parties to these applications were prejudiced by the short delay, the reply will be accepted. Further, the staff sent a letter dated November 18, 1991, to CBS and Midwest requesting additional information regarding KVBM's pleading. Each applicant responded on November 27, 1991, and KVBM replied to their responses on December 5, 1991.

according to the most recent *Arbitron Ratings Television ADI Market Guide*, the Minneapolis-St. Paul market is the fourteenth ranked television market in the United States. Additionally, in accordance with the requirements set out in the *Second Report and Order*, CBS has established that more than 30 separate "voices" will exist in the Minneapolis-St. Paul market after its proposed acquisition. Accordingly, and finding no reason to the contrary, we find that CBS has met its burden under the Top 25 Markets/30 Voices standard to justify grant of its waiver. *See Capital Cities/ABC, Inc.*, 4 FCC Rcd 5498 (1989).

## TEMPORARY TWELVE-STATION OWNERSHIP WAIVER

4. As part of its application, CBS requests grant of the assignment of station WLTE(FM), Minneapolis, Minnesota. Since CBS currently owns the maximum number of FM radio stations permitted under our national multiple ownership restrictions,[8] CBS has requested a temporary waiver of Section 73.3555(d)(1)(ii) of the Commission's Rules until 18 months after the closing of the contemplated transaction.[9] In support of its request, CBS argues that the Commission has regularly granted temporary waivers of the multiple- and cross-ownership rules to allow a proposed assignee a reasonable period to come into compliance with the rules by divesting one or more of its media properties. [10] In further support of an 18-month waiver, CBS cites two cases in which the Commission has granted temporary waivers of the national ownership cap.[11] Finally, CBS points to the depressed state of the radio station market where, without a reasonable time period to divest, it will be at a negotiating disadvantage if forced to dispose of an FM station in less than 18 months.

5. While we have established specific criteria for granting one-to-a-market waivers, we have not adopted precise guidelines for waiver of our national ownership limits. Rather, before such a waiver can be granted, an applicant must sustain the burden of showing that any benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule. *WAIT Radio v. F.C.C.*, 42418 F.2d 1153, 1157 (D.C. Cir. 1969). The basic principles of the Commission's multiple-ownership rules are to promote diversity of ownership and to maximize diversification of viewpoints, as well as to prevent any undue concentration of economic power contrary to the public interest. *Multiple Ownership Rules*, 97 FCC 2d 997 (1984), *on recon.*, 58 RR 2d 604, *further recon.*, 1 FCC Rcd 802 (1986).

6. We find that a temporary 18-month waiver will not significantly undermine the principles underlying the multiple ownership rules and will be consistent with similar waivers we have granted in the past.[12] *See RKO General* and *TVX Broadcast Group*, above. Such a limited waiver will have no undue adverse impact on the listening public. CBS has stated its intent to come into compliance with the 12-station standard, and it recently announced its plan to divest itself of station KLOU(FM), St. Louis, Missouri. In addition, local diversity of viewpoints in Minneapolis will not be significantly threatened by grant of the temporary waiver. *See* Para. 3. We believe that an 18-month period will provide CBS with adequate time to come into compliance with the Rule in an orderly manner. Moreover, permitting CBS to seek buyers within 18 months directly relates to the achievement of objectives established in related settlement agreements that we are inclined to favor. We note that, pursuant to its settlement agreement with NAACP, CBS has agreed that, in the course of its effort to identify potential purchasers of an FM station, it will undertake an affirmative action effort designed to maximize the possibility that the station might be purchased by a minority-controlled entity. In addition, we find that a "forced" sale by CBS could unnecessarily restrict the value of the station and could artificially limit the range of potential buyers to those with immediate access to the necessary capital, which may preclude the purchase of the station by local groups or minority-controlled entities. Such a result would work a hardship both on the public and on the licensee, presenting no offsetting public benefit. *See Citadel Communications Company, Ltd.*, 5 FCC Rcd 3842 (1990).

## SATELLITE PROPOSALS

7. Pursuant to the satellite exception to the contour overlap provision (duopoly rule) of the Commission's multiple-ownership rules,[13] television station KCCO-TV (formerly KCMT) (Channel 7), Alexandria, Minnesota, operates as a "satellite" of WCCO-TV, Minneapolis, Minnesota, and KCCW-TV (formerly KNMT) (Channel 12), Walker, Minnesota, operates as a "satellite" of KCCO-TV.[14] Since 1969, station WJMN-TV, Escanaba, Michigan, has been operating as a 100-percent satellite station of WFRV-TV, Green Bay, Wisconsin.[15] Pursuant to

---

[8] CBS is licensee of KCBS-FM, Los Angeles, California; KLOU(FM), St. Louis, Missouri; KLTR(FM), Houston, Texas; KRQR(FM) San Francisco, California; KTXQ-FM, Ft. Worth, Texas; WBBM-FM, Chicago, Illinois; WCBS-FM, New York, New York; WJOI(FM), Detroit, Michigan; WLTT(FM), Bethesda, Maryland; WODS(FM), Boston, Massachusetts; WOGL-FM, Philadelphia, Pennsylvania; and WYNF-FM, Tampa, Florida.

[9] CBS had originally requested, in the alternative, a temporary waiver until six months after completion of the Commission's rulemaking proceeding initiated in MM Docket 91-140, the outcome of which may affect the national ownership limit for FM radio stations. On October 11, 1991, CBS withdrew this request.

[10] CBS refers to, as examples, *Capital Cities Communications, Inc.*, 59 RR 2d 451 (1985) (subseq. history omitted) (18 months to divest radio stations from previously grandfathered AM-FM-TV combinations); *Metromedia Radio & Television, Inc.*, 102 FCC 2d 1334 (1985) (subseq. history omitted) (24 months to divest newspaper-television cross-ownership); *Knoxville Channel 8 Limited Partnership*, 4 FCC Rcd 4760 (1989) (18 months to divest FM from FM-TV combination).

[11] *RKO General Inc. (KRTH)*, 4 FCC Rcd 4089 (1989) (*"RKO General"* ); *TVX Broadcast Group, Inc.*, 2 FCC Rcd 1534 (1987) (*"TVX Broadcast Group"* ) (six-month waivers granted).

[12] We note that the multiple ownership rules are included in a pending rulemaking that is examining a number of the Commission's radio regulations. *See Revision of Radio Rules and Policies*, 6 FCC Rcd 3275 (1991). Our decision in this case merely involves the application of existing waiver criteria and in no way suggests the outcome of that proceeding. *See WAIT Radio*, at 1159.

[13] 47 C.F.R. Sec. 73.3555(a)(3), Note 5.

[14] *See Central Minnesota Television, Inc.*, 2 FCC Rcd 6730 (1987).

[15] *See WFRV, Inc.*, 17 FCC 2d 435, 437 (1969).

the above-captioned applications, CBS seeks to acquire these five television stations and intends to maintain the "satellite" status of KCCO-TV, KCCW-TV, and WJMN-TV. Under prior Commission policy, applicants for renewal or assignment were not required to make a specific showing to justify continued satellite operation of the station being renewed or sold.[16] Rather, they needed merely to demonstrate that the economic circumstances in the market that had justified the original grant of satellite status had not significantly changed. We have recently revised our policies regarding new and existing television satellite stations. On July 8, 1991, we released the *Satellite Report and Order*, which announced that, effective August 14, 1991, we would require all applicants seeking to transfer or assign satellite stations to demonstrate that the conditions warranting satellite status under this new policy prevail at the time of transfer or assignment. Absent such a showing, we will consider the satellite to be a full-service station for purposes of acting on the assignment or transfer application.

8. Under our new approach, an applicant for television satellite status will be entitled to a presumption that the proposed satellite operation is in the public interest if the applicant meets the following three criteria: (1) there is no City-Grade signal contour overlap between the parent and the satellite; (2) the proposed satellite will provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Satellite Report and Order*, 6 FCC Rcd at 4213-14. Applicants that qualify for the presumption, when unrebutted, will be viewed favorably by the Commission. *Id.* at 4214. If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis and grant the application if there are other compelling circumstances that warrant approval. *Id.*

9. In order to satisfy the first step of the presumption, the applicants submitted an engineering study showing that none of the satellite stations' City-Grade contours overlap with those of the parent stations. In support of the second criterion, the applicants rely on the "transmission test" to show that each satellite station provides service to an underserved area. Under the transmission test, a proposed satellite's community of license is considered underserved if it has two or fewer full-service stations already licensed to it. *Id.*, at 4215. In this regard, we note that KCCW-TV is the only television station licensed to Walker, Minnesota, and that WJMN-TV is the only television station licensed to Escanaba, Michigan. Alexandria, Minnesota, has two television stations: KCCO-TV and KSAX-TV, both operating as satellites. Accordingly, based on the foregoing, the applicants have satisfied the first two tests for qualifying for the public interest presumption.

10. The third prong of the presumption requires applicants to demonstrate that no alternative operator is ready and able to purchase and operate the proposed satellite as a full-service station. This third factor reflects the Commission's traditional consideration of the proposed satellite's ability to survive as a full-service operation in the market. In the *Satellite Report and Order*, we stated that we would expect the seller to establish its diligence in trying to find a buyer. Without specifying any factors for this showing, we indicated that the seller should provide some specific evidence of its efforts, such as listing the station with a broker, the number of resulting inquiries or lack of them, and the reasons any serious negotiations did not lead to a sale. Regarding this element of the presumption, the applicants state that Midwest made no specific efforts to sell the three existing satellite stations to persons who would operate them as nonsatellite stations. The applicants believe, however, that a strict application of this presumption in this case would be "grossly unfair," since Midwest could not have reasonably foreseen that such efforts would be required prior to the release of the *Satellite Report and Order*. Nevertheless, the applicants argue that even if such efforts were made, no full-service buyer for the satellite stations could have been found. In support of this argument, the applicants submitted the statements of two established media brokerage and appraisal firms, each concluding that it would not be feasible to find a purchaser willing to operate any of the three satellite stations as full-service stations. They based their conclusions on the small size of the markets involved, the expense of upgrading to a full-service station, geographical and population considerations, and the current depressed market for television stations.

11. While the applicant has not presented the specific evidence contemplated by the *Satellite Report and Order* to support the third criterion, we find that it has made a strong enough showing to justify satellite operation under an *ad hoc* analysis. CBS clearly has satisfied the first two criteria of the presumption. As for the third, given the totality of the circumstances discussed below, we believe CBS has made a compelling showing under our *ad hoc* approach.[17]

12. First, the applicant has submitted a letter from Goldman, Sachs, & Co. asserting that, in its attempt to find a buyer for Midwest's properties, no inquiries were received about purchasing the satellites as full-service stations. Also, the applicants provide reports from two brokers, Blackburn & Company and R. C. Crisler & Co., indicating that the Walker, Alexandria, and Escanaba markets could not support full-service operations. Similar economic reports and conclusions by media brokers played an important role in our decision to authorize satellite operations in Walker and Alexandria in 1987, when we authorized the Alexandria station's change from full-service television status and the Walker station's continuation of satellite status. *See Central Minnesota Television, Inc.*, 2 FCC Rcd 6730 (1987). In fact, since that time, the Alexandria market has dwindled to such an extent that Arbitron no longer lists Alexandria as a separate market; instead, Arbitron includes it as part of the Minneapolis/St. Paul market. Likewise the brokers' assessment of Escanaba indicates that the community's declining population, the station's location (between the Green Bay, Wisconsin and Marquette, Michigan markets), and in-

[16] *See, e.g., WSTM-TV, Inc.*, 54 RR 2d 1327, 1338, n. 32 (1983).

[17] In the *Satellite Report and Order*, we indicated that the "degree of departure from the presumptive criteria will also influence our decision" under the *ad hoc* approach. 6 FCC Rcd at 4214. Here, the departure is not substantial.

creasing cable penetration would prevent sufficient audience support to justify the entry of another full-service station into the market. Additionally, in taking into account the current depressed market for the purchase of television stations in general, one broker concluded that prospective purchasers who could finance a purchase and a costly conversion of a satellite station are nonexistent at the present time. Finally, we note that CBS and Midwest began negotiating the sale of the group of stations before the Commission altered the satellite policy, at a time when the Commission generally had authorized purchases and renewals of the stations as satellites without a policy that involved establishing a lack of alternative buyers to qualify for a presumption.

13. In summary, we note the conclusions of the media brokers, the applicants' strong showings under the first two elements of the satellite presumption, and Midwest's reasonable inability during negotiations with CBS to foresee the future Commission presumption requirement of demonstrating that no alternative operator would be ready and able to operate the stations as fullservice operations. We therefore find under our *ad hoc* approach that the applicants have demonstrated that continued satellite operation of KCCO-TV, KCCW-TV, and WJMN-TV is in the public interest.

## KVBM PETITION TO DENY

14. KVBM Television, Inc. (KVBM), permittee of station KVBM(TV), Channel 45, Minneapolis, Minnesota, has filed a Petition to Deny the assignment of WCCO-TV, Minneapolis, Minnesota. KVBM asserts that Midwest has refused to grant it access to a tower which Midwest controls, in violation of Section 73.635 of the Commission's Rules.[18] Telefarm, Inc. (Telefarm) owns one of two tall towers in a Shoreview, Minnesota antenna farm. Telefarm's tower holds the antennas for the three VHF, network-affiliated stations in the Minneapolis area. Telefarm is a corporation controlled by the licensees of the three VHF stations, including Midwest. Because Telefarm is a unanimous-consent corporation, each licensee has negative control and the ability to reject requests for space. KVBM maintains that Telefarm's refusal to grant access constitutes a violation of the rule by Midwest. If the above-captioned application is granted, CBS will succeed to Midwest's interest in Telefarm.

15. Both CBS and Midwest contend that no relationship exists between KVBM's request for tower access and the proposed assignment. They assert that the anticompetitive effects that flow from the exclusive use of an allegedly unique antenna site do not turn in any way upon the identity of the licensee controlling the site. In addition, while neither applicant concedes the applicability of the rule to the Telefarm site, CBS declares that, upon becoming the licensee, it would promptly evaluate the matter, discuss the pertinent issues with KVBM and the other affected parties, and act with due regard to Section 73.635.

16. Under these circumstances, no action will be taken on KVBM's allegations at this time; the instant assignment application is not the appropriate forum for examining the issues presented by the petition. Due to the structure of Telefarm, comprehensive examination of KVBM's claims requires the involvement of the other two shareholders, neither of which is currently before us. Moreover, we note KVBM's statement in its letter dated December 5, 1991, that its intent is not to thwart the assignment of WCCO TV, but rather to have its claim of access heard at the earliest possible time. Furthermore, we understand CBS's declaration to mean that, upon assuming its interests in WCCO-TV and Telefarm, it will give serious consideration to KVBM's request for collocation. Consequently, grant of the subject application will in no way prejudice any future Commission action deemed appropriate with respect to this matter.[19]

## CONCLUSION

17. Therefore, based upon the above, having determined that the applicants are qualified in all respects, we find that grant of the above-captioned applications and authorization of the proposed satellite operations of stations KCCO-TV, Alexandria, Minnesota, KCCW-TV, Walker, Minnesota, and WJMN-TV, Escanaba, Michigan, would serve the public interest.

18. Accordingly, IT IS ORDERED that the Petition to Deny of KVBM Television, Inc. IS DISMISSED.

19. IT IS FURTHER ORDERED that CBS's request for a waiver of Section 73.3555(b), to authorize common ownership of Stations WCCO(AM), WLTE(FM), and WCCO-TV, Minneapolis, Minnesota, IS GRANTED.

20. IT IS FURTHER ORDERED that the applications seeking assignment of the licenses held by Midwest Communications, Inc. to CBS Inc. ARE GRANTED, subject to the condition that CBS come into compliance with Section 73.3555(d)(1)(ii) within 18 months of consummation of the proposed transaction.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[18] The Rule states that "[n]o television license or renewal of a television license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) which is not available for use by other television licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations."

[19] In that regard, we direct the staff to initiate as soon as possible an appropriate inquiry to examine KVBM's alleged right of access to the Telefarm site.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-365**

In the Matter of

American Network Exchange, Inc.

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. American Network Exchange, Inc. (Amnex) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Amnex's informational tariff and further information that we have directed OSPs to file, we find that at least some of Amnex's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Amnex must announce that its rates are available on request at the beginning of each call handled by Amnex. Further, as we discuss below, Amnex must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of Amnex's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Amnex's charges for these calls are as high as $8.74 for one eight-minute call. This charge is among the highest reported by any OSP for

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Amnex to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Amnex to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Amnex must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Amnex should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Amnex should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Amnex uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Amnex should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Amnex must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Amnex shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Amnex must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Amnex may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Amnex must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. Amnex is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Amnex must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Amnex's submission shall be captioned "Justification of Operator Service Rates of Amnex." Amnex shall include the docket number of this proceeding on the cover sheet to its Justification. Amnex is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Amnex's submission not later than 25 days after Amnex's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Amnex." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Amnex. Finally, Amnex may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Amnex" and must in all other respects comply with the filing requirements described in the preceding paragraph. Amnex must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), American Network Exchange, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that American Network Exchange, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), American Network Exchange, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid in Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-366**

In the Matter of

American Public Communications

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. American Public Communications (APC) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of APC's informational tariff and further information that we have directed OSPs to file, we find that at least some of APC's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, APC must announce that its rates are available on request at the beginning of each call handled by APC. Further, as we discuss below, APC must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of APC's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that APC's charges for these calls are as high as $7.66 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

not appear to be just and reasonable. We therefore direct APC to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct APC to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. APC must complete the Statement of Costs and Revenues that is attached to this Order. In addition, APC should present any other information that it believes demonstrates that its rates and charges are just and reasonable. APC should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities APC uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. APC should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, APC must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. APC shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] APC must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, APC may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. APC must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. APC is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. APC must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. APC's submission shall be captioned "Justification of Operator Service Rates of APC." APC shall include the docket number of this proceeding on the cover sheet to its Justification. APC is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on APC's submission not later than 25 days after APC's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of APC." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on APC. Finally, APC may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of APC" and must in all other respects comply with the filing requirements described in the preceding paragraph. APC must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), American Public Communications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that American Public Communications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), American Public Communications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company:_____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| **2090 TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid in Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| **2230 TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-367**

In the Matter of

Ascom Autelca Communications

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Ascom Autelca Communications (Ascom) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Ascom's informational tariff and further information that we have directed OSPs to file, we find that at least some of Ascom's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Ascom must announce that its rates are available on request at the beginning of each call handled by Ascom. Further, as we discuss below, Ascom must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of Ascom's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Ascom's charges for these calls are as high as $10.30 for one eight-minute call. This charge is among the highest reported by any OSP for

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Ascom to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Ascom to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Ascom must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Ascom should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Ascom should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Ascom uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Ascom should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Ascom must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Ascom shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30. 1991.[5] Ascom must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Ascom may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Ascom must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. Ascom is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Ascom must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Ascom's submission shall be captioned "Justification of Operator Service Rates of Ascom." Ascom shall include the docket number of this proceeding on the cover sheet to its Justification. Ascom is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Ascom's submission not later than 25 days after Ascom's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Ascom." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Ascom. Finally, Ascom may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Ascom" and must in all other respects comply with the filing requirements described in the preceding paragraph. Ascom must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Ascom Autelca Communications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Ascom Autelca Communications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Ascom Autelca Communications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| **2090 TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid in Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| **2230 TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-368**

In the Matter of

Fone America, Inc.

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Fone America, Inc. (Fone America) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Fone America's informational tariff and further information that we have directed OSPs to file, we find that at least some of Fone America's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Fone America must announce that its rates are available on request at the beginning of each call handled by Fone America. Further, as we discuss below, Fone America must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of Fone America's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Fone America's charges for these calls are as high as $7.88 for one eight-minute call. This charge is among the highest reported by

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

any OSP for one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Fone America to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Fone America to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Fone America must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Fone America should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Fone America should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Fone America uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Fone America should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Fone America must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Fone America shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Fone America must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Fone America may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Fone America must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. Fone America is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Fone America must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Fone America's submission shall be captioned "Justification of Operator Service Rates of Fone America." Fone America shall include the docket number of this proceeding on the cover sheet to its Justification. Fone America is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Fone America's submission not later than 25 days after Fone America's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Fone America." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Fone America. Finally, Fone America may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Fone America" and must in all other respects comply with the filing requirements described in the preceding paragraph. Fone America must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Fone America, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Fone America, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Fone America, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company:_____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid In Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-369**

In the Matter of

Fiberline Network Communications

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Fiberline Network Communications (FNC) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of FNC's informational tariff and further information that we have directed OSPs to file, we find that at least some of FNC's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, FNC must announce that its rates are available on request at the beginning of each call handled by FNC. Further, as we discuss below, FNC must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of FNC's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that FNC's charges for these calls are as high as $9.81 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

not appear to be just and reasonable. We therefore direct FNC to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct FNC to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. FNC must complete the Statement of Costs and Revenues that is attached to this Order. In addition, FNC should present any other information that it believes demonstrates that its rates and charges are just and reasonable. FNC should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities FNC uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. FNC should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, FNC must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. FNC shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] FNC must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, FNC may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. FNC must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. FNC is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. FNC must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. FNC's submission shall be captioned "Justification of Operator Service Rates of FNC." FNC shall include the docket number of this proceeding on the cover sheet to its Justification. FNC is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on FNC's submission not later than 25 days after FNC's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of FNC." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on FNC. Finally, FNC may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of FNC" and must in all other respects comply with the filing requirements described in the preceding paragraph. FNC must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Fiberline Network Communications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Fiberline Network Communications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Fiberline Network Communications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company:_____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid in Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-370**

In the Matter of

Ju-Le Corporation

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Ju-Le Corporation (Ju-Le) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Ju-Le's informational tariff and further information that we have directed OSPs to file, we find that at least some of Ju-Le's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Ju-Le must announce that its rates are available on request at the beginning of each call handled by Ju-Le. Further, as we discuss below, Ju-Le must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of Ju-Le's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Ju-Le's charges for these calls are as high as $8.82 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

not appear to be just and reasonable. We therefore direct Ju-Le to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Ju-Le to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Ju-Le must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Ju-Le should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Ju-Le should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Ju-Le uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Ju-Le should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Ju-Le must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Ju-Le shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Ju-Le must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Ju-Le may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Ju-Le must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. Ju-Le is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Ju-Le must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Ju-Le's submission shall be captioned "Justification of Operator Service Rates of Ju-Le." Ju-Le shall include the docket number of this proceeding on the cover sheet to its Justification. Ju-Le is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Ju-Le's submission not later than 25 days after Ju-Le's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Ju-Le." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Ju-Le. Finally, Ju-Le may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Ju-Le" and must in all other respects comply with the filing requirements described in the preceding paragraph. Ju-Le must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Ju-Le Corporation SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Ju-Le Corporation SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Ju-Le Corporation SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company:_____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid In Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-371**

In the Matter of

One Call Communications, Inc.

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. One Call Communications, Inc. (One Call) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of One Call's informational tariff and further information that we have directed OSPs to file, we find that at least some of One Call's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, One Call must announce that its rates are available on request at the beginning of each call handled by One Call. Further, as we discuss below, One Call must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of One Call's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that One Call's charges for these calls are as high as $7.87 for one eight-minute call. This charge is among the highest reported by any OSP for

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct One Call to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct One Call to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. One Call must complete the Statement of Costs and Revenues that is attached to this Order. In addition, One Call should present any other information that it believes demonstrates that its rates and charges are just and reasonable. One Call should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities One Call uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. One Call should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, One Call must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. One Call shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] One Call must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, One Call may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. One Call must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. One Call is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. One Call must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. One Call's submission shall be captioned "Justification of Operator Service Rates of One Call." One Call shall include the docket number of this proceeding on the cover sheet to its Justification. One Call is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on One Call's submission not later than 25 days after One Call's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of One Call." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on One Call. Finally, One Call may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of One Call" and must in all other respects comply with the filing requirements described in the preceding paragraph. One Call must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), One Call Communications, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that One Call Communications, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), One Call Communications, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION
Carl D. Lawson

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company:_____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Revenues and Income** | | | | |
| 1010 Operating Revenues | | | | |
| 1020 Uncollectible Revenues | | | | |
| 1030 Non-Operating Income 3/ | | | | |
| 1040 Other 3/ | | | | |
| 1050 TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | |
| 1060 Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 Salaries & Wages, Others | | | | |
| 1090 Health and Life Insurance | | | | |
| 1100 General Insurance | | | | |
| 1110 Miscellaneous Operating Expenses 3/ | | | | |
| 1120 Taxes | | | | |
| 1130 Access Expense | | | | |
| 1140 Depreciation | | | | |
| 1150 Interest on Short-Term Debt 5/ | | | | |
| 1160 Interest on Long-Term Debt 6/ | | | | |
| 1170 Other Operating Expenses 3/ | | | | |
| 1180 Other Expense 3/ | | | | |
| 1190 TOTAL EXPENSES 7/ | | | | |
| 1200 NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | |
| 1210 Number of Full-Time Employees | | | | |
| 1220 Number of Part-Time Employees | | | | |
| 1230 Number of Workhours, Full-Time Employees | | | | |
| 1240 Number of Workhours, Part-Time Employees | | | | |
| 1250 Number of Operator Calls Handled | | | | |
| 1260 Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid in Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-372**

In the Matter of

Pay Com, Inc.

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Pay Com, Inc. (Pay Com) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Pay Com's informational tariff and further information that we have directed OSPs to file, we find that at least some of Pay Com's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Pay Com must announce that its rates are available on request at the beginning of each call handled by Pay Com. Further, as we discuss below, Pay Com must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of Pay Com's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Pay Com's charges for these calls are as high as $8.20 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

does not appear to be just and reasonable. We therefore direct Pay Com to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Pay Com to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Pay Com must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Pay Com should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Pay Com should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Pay Com uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Pay Com should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Pay Com must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Pay Com shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Pay Com must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Pay Com may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Pay Com must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. Pay Com is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Pay Com must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Pay Com's submission shall be captioned "Justification of Operator Service Rates of Pay Com." Pay Com shall include the docket number of this proceeding on the cover sheet to its Justification. Pay Com is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Pay Com's submission not later than 25 days after Pay Com's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Pay Com." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Pay Com. Finally, Pay Com may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Pay Com" and must in all other respects comply with the filing requirements described in the preceding paragraph. Pay Com must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Pay Com, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Pay Com, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Pay Com, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non–Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short–Term Debt 5/ | | | | |
| 1160 | Interest on Long–Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full–Time Employees | | | | |
| 1220 | Number of Part–Time Employees | | | | |
| 1230 | Number of Workhours, Full–Time Employees | | | | |
| 1240 | Number of Workhours, Part–Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company:_____

Period: On December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Assets:** | | | | | |
| **Current and Accrued Assets** | | | | | |
| 2010 | Operating Assets | | | | |
| 2020 | Other Current and Accrued Assets 3/ | | | | |
| 2030 | TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | | |
| 2040 | Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 | Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 | Accumulated Depreciation | | | | |
| 2070 | Other Non-Current Assets 3/ | | | | |
| 2080 | TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 | **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | | |
| **Current and Accrued Liabilities** | | | | | |
| 2100 | Accounts Payable | | | | |
| 2110 | Notes Payable (current portion) | | | | |
| 2120 | Accrued Taxes | | | | |
| 2130 | Other Current and Accrued Liabilities 3/ | | | | |
| 2140 | TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | | |
| 2150 | TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | | |
| 2160 | Accumulated Deferred Income Tax & Credits | | | | |
| 2170 | Other 3/ | | | | |
| 2180 | TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | | |
| 2190 | Capital Stock | | | | |
| 2200 | Additional Paid in Capital | | | | |
| 2210 | Other Capital 3/ | | | | |
| 2220 | TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 | **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-373**

In the Matter of

Pilgrim Telephone, Inc.

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Pilgrim Telephone, Inc. (Pilgrim) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Pilgrim's informational tariff and further information that we have directed OSPs to file, we find that at least some of Pilgrim's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Pilgrim must announce that its rates are available on request at the beginning of each call handled by Pilgrim. Further, as we discuss below, Pilgrim must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of Pilgrim's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Pilgrim's charges for these calls are as high as $8.00 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

does not appear to be just and reasonable. We therefore direct Pilgrim to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Pilgrim to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Pilgrim must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Pilgrim should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Pilgrim should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Pilgrim uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Pilgrim should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Pilgrim must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Pilgrim shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Pilgrim must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Pilgrim may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Pilgrim must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. Pilgrim is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Pilgrim must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Pilgrim's submission shall be captioned "Justification of Operator Service Rates of Pilgrim." Pilgrim shall include the docket number of this proceeding on the cover sheet to its Justification. Pilgrim is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Pilgrim's submission not later than 25 days after Pilgrim's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Pilgrim." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Pilgrim. Finally, Pilgrim may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Pilgrim" and must in all other respects comply with the filing requirements described in the preceding paragraph. Pilgrim must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Pilgrim Telephone, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Pilgrim Telephone, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Pilgrim Telephone, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Revenues and Income** | | | | |
| 1010 Operating Revenues | | | | |
| 1020 Uncollectible Revenues | | | | |
| 1030 Non-Operating Income 3/ | | | | |
| 1040 Other 3/ | | | | |
| 1050 TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | |
| 1060 Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 Salaries & Wages, Others | | | | |
| 1090 Health and Life Insurance | | | | |
| 1100 General Insurance | | | | |
| 1110 Miscellaneous Operating Expenses 3/ | | | | |
| 1120 Taxes | | | | |
| 1130 Access Expense | | | | |
| 1140 Depreciation | | | | |
| 1150 Interest on Short-Term Debt 5/ | | | | |
| 1160 Interest on Long-Term Debt 6/ | | | | |
| 1170 Other Operating Expenses 3/ | | | | |
| 1180 Other Expense 3/ | | | | |
| 1190 TOTAL EXPENSES 7/ | | | | |
| 1200 NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | |
| 1210 Number of Full-Time Employees | | | | |
| 1220 Number of Part-Time Employees | | | | |
| 1230 Number of Workhours, Full-Time Employees | | | | |
| 1240 Number of Workhours, Part-Time Employees | | | | |
| 1250 Number of Operator Calls Handled | | | | |
| 1260 Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid in Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-374**

In the Matter of

Southeast Pay Telephone, Inc.

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Southeast Pay Telephone, Inc. (SPT) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of SPT's informational tariff and further information that we have directed OSPs to file, we find that at least some of SPT's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, SPT must announce that its rates are available on request at the beginning of each call handled by SPT. Further, as we discuss below, SPT must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of SPT's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that SPT's charges for these calls are as high as $7.56 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does not

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

appear to be just and reasonable. We therefore direct SPT to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct SPT to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. SPT must complete the Statement of Costs and Revenues that is attached to this Order. In addition, SPT should present any other information that it believes demonstrates that its rates and charges are just and reasonable. SPT should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities SPT uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. SPT should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, SPT must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. SPT shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991. [5] SPT must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, SPT may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. SPT must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. SPT is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. SPT must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. SPT's submission shall be captioned "Justification of Operator Service Rates of SPT." SPT shall include the docket number of this proceeding on the cover sheet to its Justification. SPT is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on SPT's submission not later than 25 days after SPT's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of SPT." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on SPT. Finally, SPT may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of SPT" and must in all other respects comply with the filing requirements described in the preceding paragraph. SPT must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Southeast Pay Telephone, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Southeast Pay Telephone, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Southeast Pay Telephone, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| **2090 TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid in Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| **2230 TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-375**

In the Matter of

Telephone Operating Systems

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Telephone Operating Systems (TOS) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of TOS's informational tariff and further information that we have directed OSPs to file, we find that at least some of TOS's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, TOS must announce that its rates are available on request at the beginning of each call handled by TOS. Further, as we discuss below, TOS must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of TOS's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that TOS's charges for these calls are as high as $7.80 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

not appear to be just and reasonable. We therefore direct TOS to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct TOS to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. TOS must complete the Statement of Costs and Revenues that is attached to this Order. In addition, TOS should present any other information that it believes demonstrates that its rates and charges are just and reasonable. TOS should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities TOS uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. TOS should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, TOS must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. TOS shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] TOS must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, TOS may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. TOS must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. TOS is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. TOS must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. TOS's submission shall be captioned "Justification of Operator Service Rates of TOS." TOS shall include the docket number of this proceeding on the cover sheet to its Justification. TOS is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on TOS's submission not later than 25 days after TOS's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of TOS." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on TOS. Finally, TOS may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of TOS" and must in all other respects comply with the filing requirements described in the preceding paragraph. TOS must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Telephone Operating Systems SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Telephone Operating Systems SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Telephone Operating Systems SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid In Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-376**

In the Matter of

USA Payphone Systems

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. USA Payphone Systems (USAPS) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of USAPS's informational tariff and further information that we have directed OSPs to file, we find that at least some of USAPS's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, USAPS must announce that its rates are available on request at the beginning of each call handled by USAPS. Further, as we discuss below, USAPS must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of USAPS's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that USAPS's charges for these calls are as high as $9.00 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

does not appear to be just and reasonable. We therefore direct USAPS to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct USAPS to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. USAPS must complete the Statement of Costs and Revenues that is attached to this Order. In addition, USAPS should present any other information that it believes demonstrates that its rates and charges are just and reasonable. USAPS should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities USAPS uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. USAPS should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, USAPS must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. USAPS shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] USAPS must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, USAPS may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. USAPS must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. USAPS is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. USAPS must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. USAPS's submission shall be captioned "Justification of Operator Service Rates of USAPS." USAPS shall include the docket number of this proceeding on the cover sheet to its Justification. USAPS is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on USAPS's submission not later than 25 days after USAPS's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of USAPS." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on USAPS. Finally, USAPS may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of USAPS" and must in all other respects comply with the filing requirements described in the preceding paragraph. USAPS must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), USA Payphone Systems SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that USA Payphone Systems SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), USA Payphone Systems SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Revenues and Income** | | | | |
| 1010 Operating Revenues | | | | |
| 1020 Uncollectible Revenues | | | | |
| 1030 Non-Operating Income 3/ | | | | |
| 1040 Other 3/ | | | | |
| 1050 TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | |
| 1060 Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 Salaries & Wages, Others | | | | |
| 1090 Health and Life Insurance | | | | |
| 1100 General Insurance | | | | |
| 1110 Miscellaneous Operating Expenses 3/ | | | | |
| 1120 Taxes | | | | |
| 1130 Access Expense | | | | |
| 1140 Depreciation | | | | |
| 1150 Interest on Short-Term Debt 5/ | | | | |
| 1160 Interest on Long-Term Debt 6/ | | | | |
| 1170 Other Operating Expenses 3/ | | | | |
| 1180 Other Expense 3/ | | | | |
| 1190 TOTAL EXPENSES 7/ | | | | |
| 1200 NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | |
| 1210 Number of Full-Time Employees | | | | |
| 1220 Number of Part-Time Employees | | | | |
| 1230 Number of Workhours, Full-Time Employees | | | | |
| 1240 Number of Workhours, Part-Time Employees | | | | |
| 1250 Number of Operator Calls Handled | | | | |
| 1260 Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Assets:** | | | | | |
| **Current and Accrued Assets** | | | | | |
| 2010 | Operating Assets | | | | |
| 2020 | Other Current and Accrued Assets 3/ | | | | |
| 2030 | TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | | |
| 2040 | Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 | Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 | Accumulated Depreciation | | | | |
| 2070 | Other Non-Current Assets 3/ | | | | |
| 2080 | TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 | **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | | |
| **Current and Accrued Liabilities** | | | | | |
| 2100 | Accounts Payable | | | | |
| 2110 | Notes Payable (current portion) | | | | |
| 2120 | Accrued Taxes | | | | |
| 2130 | Other Current and Accrued Liabilities 3/ | | | | |
| 2140 | TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | | |
| 2150 | TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | | |
| 2160 | Accumulated Deferred Income Tax & Credits | | | | |
| 2170 | Other 3/ | | | | |
| 2180 | TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | | |
| 2190 | Capital Stock | | | | |
| 2200 | Additional Paid in Capital | | | | |
| 2210 | Other Capital 3/ | | | | |
| 2220 | TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 | **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-377**

In the Matter of

U.S. Communications
of Westchester

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. U.S. Communications of Westchester (USCW) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of USCW's informational tariff and further information that we have directed OSPs to file, we find that at least some of USCW's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, USCW must announce that its rates are available on request at the beginning of each call handled by USCW. Further, as we discuss below, USCW must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of USCW's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that USCW's charges for these calls are as high as $11.24 for one eight-minute call.

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct USCW to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct USCW to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. USCW must complete the Statement of Costs and Revenues that is attached to this Order. In addition, USCW should present any other information that it believes demonstrates that its rates and charges are just and reasonable. USCW should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities USCW uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. USCW should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, USCW must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. USCW shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] USCW must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, USCW may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. USCW must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. USCW is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. USCW must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. USCW's submission shall be captioned "Justification of Operator Service Rates of USCW." USCW shall include the docket number of this proceeding on the cover sheet to its Justification. USCW is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on USCW's submission not later than 25 days after USCW's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of USCW." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on USCW. Finally, USCW may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of USCW" and must in all other respects comply with the filing requirements described in the preceding paragraph. USCW must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), U.S. Communications of Westchester SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that U. S. Communications of Westchester SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), U.S. Communications of Westchester SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Assets:** | | | | | |
| **Current and Accrued Assets** | | | | | |
| 2010 | Operating Assets | | | | |
| 2020 | Other Current and Accrued Assets 3/ | | | | |
| 2030 | TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | | |
| 2040 | Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 | Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 | Accumulated Depreciation | | | | |
| 2070 | Other Non-Current Assets 3/ | | | | |
| 2080 | TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 | **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | | |
| **Current and Accrued Liabilities** | | | | | |
| 2100 | Accounts Payable | | | | |
| 2110 | Notes Payable (current portion) | | | | |
| 2120 | Accrued Taxes | | | | |
| 2130 | Other Current and Accrued Liabilities 3/ | | | | |
| 2140 | TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | | |
| 2150 | TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | | |
| 2160 | Accumulated Deferred Income Tax & Credits | | | | |
| 2170 | Other 3/ | | | | |
| 2180 | TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | | |
| 2190 | Capital Stock | | | | |
| 2200 | Additional Paid in Capital | | | | |
| 2210 | Other Capital 3/ | | | | |
| 2220 | TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 | **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-378**

In the Matter of

United Tele-Systems
of Virginia

**ORDER**

**Adopted: December 23, 1991; Released: December 23, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. United Tele-Systems of Virginia (UTV) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of UTV's informational tariff and further information that we have directed OSPs to file, we find that at least some of UTV's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, UTV must announce that its rates are available on request at the beginning of each call handled by UTV. Further, as we discuss below, UTV must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

## II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

## III. DISCUSSION

6. Our review of UTV's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that UTV's charges for these calls are as high as $8.22 for one eight-minute call. This

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct UTV to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct UTV to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. UTV must complete the Statement of Costs and Revenues that is attached to this Order. In addition, UTV should present any other information that it believes demonstrates that its rates and charges are just and reasonable. UTV should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities UTV uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. UTV should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, UTV must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. UTV shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] UTV must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, UTV may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. UTV must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

## IV. FILING REQUIREMENTS

11. UTV is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. UTV must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. UTV's submission shall be captioned "Justification of Operator Service Rates of UTV." UTV shall include the docket number of this proceeding on the cover sheet to its Justification. UTV is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12.Interested parties may file comments on UTV's submission not later than 25 days after UTV's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of UTV." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on UTV. Finally, UTV may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of UTV" and must in all other respects comply with the filing requirements described in the preceding paragraph. UTV must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

## V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), United TeleSystems of Virginia SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that United TeleSystems of Virginia SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), United Tele-Systems of Virginia SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Burea

ATTACHMENT A

# CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

*Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.*

# Statement of Income and Operations

Company:_____

Period: January 1, 1990 through December 31, 1990

| Line # and Account 1/ | | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|---|
| **Revenues and Income** | | | | | |
| 1010 | Operating Revenues | | | | |
| 1020 | Uncollectible Revenues | | | | |
| 1030 | Non-Operating Income 3/ | | | | |
| 1040 | Other 3/ | | | | |
| 1050 | TOTAL REVENUES AND INCOME 4/ | | | | |
| **Expenses** | | | | | |
| 1060 | Salaries & Wages, Owners & Officers of Company | | | | |
| 1070 | Salaries & Wages, Relatives of Owners & Officers | | | | |
| 1080 | Salaries & Wages, Others | | | | |
| 1090 | Health and Life Insurance | | | | |
| 1100 | General Insurance | | | | |
| 1110 | Miscellaneous Operating Expenses 3/ | | | | |
| 1120 | Taxes | | | | |
| 1130 | Access Expense | | | | |
| 1140 | Depreciation | | | | |
| 1150 | Interest on Short-Term Debt 5/ | | | | |
| 1160 | Interest on Long-Term Debt 6/ | | | | |
| 1170 | Other Operating Expenses 3/ | | | | |
| 1180 | Other Expense 3/ | | | | |
| 1190 | TOTAL EXPENSES 7/ | | | | |
| 1200 | NET INCOME 8/ | | | | |
| **Operating Statistics** | | | | | |
| 1210 | Number of Full-Time Employees | | | | |
| 1220 | Number of Part-Time Employees | | | | |
| 1230 | Number of Workhours, Full-Time Employees | | | | |
| 1240 | Number of Workhours, Part-Time Employees | | | | |
| 1250 | Number of Operator Calls Handled | | | | |
| 1260 | Number of Months in Operation During 1990 | | | | |

# Statement of Investment

Company: _____

Period: On December 31, 1990

| Line # and Account 1/ | Operator Service | Other Telephone Related | Other | Total Company 2/ |
|---|---|---|---|---|
| **Assets:** | | | | |
| **Current and Accrued Assets** | | | | |
| 2010 Operating Assets | | | | |
| 2020 Other Current and Accrued Assets 3/ | | | | |
| 2030 TOTAL CURRENT AND ACCRUED ASSETS 9/ | | | | |
| **Non-Current Assets** | | | | |
| 2040 Property, Plant, & Equipment, Shared 10/ | | | | |
| 2050 Property, Plant, & Equipment, Dedicated 11/ | | | | |
| 2060 Accumulated Depreciation | | | | |
| 2070 Other Non-Current Assets 3/ | | | | |
| 2080 TOTAL NON-CURRENT ASSETS 12/ | | | | |
| 2090 **TOTAL ASSETS 13/** | | | | |
| **Liabilities and Equity:** | | | | |
| **Current and Accrued Liabilities** | | | | |
| 2100 Accounts Payable | | | | |
| 2110 Notes Payable (current portion) | | | | |
| 2120 Accrued Taxes | | | | |
| 2130 Other Current and Accrued Liabilities 3/ | | | | |
| 2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/ | | | | |
| **Total Long-Term Debt** | | | | |
| 2150 TOTAL LONG-TERM DEBT | | | | |
| **Deferred Credits** | | | | |
| 2160 Accumulated Deferred Income Tax & Credits | | | | |
| 2170 Other 3/ | | | | |
| 2180 TOTAL DEFERRED CREDITS 15/ | | | | |
| **Equity** | | | | |
| 2190 Capital Stock | | | | |
| 2200 Additional Paid In Capital | | | | |
| 2210 Other Capital 3/ | | | | |
| 2220 TOTAL EQUITY ACCOUNTS 16/ | | | | |
| 2230 **TOTAL LIABILITIES AND EQUITY 17/** | | | | |

## Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 90-6**

In the matter of

Amendment of Part 22 of the Commission's rules to provide for filing and processing of applications for unserved areas in the cellular service and to modify other cellular rules

## ORDER

**Adopted: December 24, 1991; Released: December 26, 1991**

By the Deputy Chief (Operations), Common Carrier Bureau:

## I. INTRODUCTION

1. On October 18, 1991, the Commission issued rules for the acceptance, processing and selection of applications for unserved areas in the cellular service, and deadlines for the submission of updated cellular system information.[1] Concurrently, the Commission issued a Further Notice of Proposed Rule Making requesting comments on its proposal that the Cellular Geographic Service Areas (CGSAs) of all cellular systems be altered to more closely reflect the area where service is actually provided by licensees.[2] Cellular Telecommunications Industry Association (CTIA) filed a motion for temporary suspension of the dates for filing updated cellular system information and the filing of unserved area applications as announced in the *Report and Order*. For the reasons set forth below, we will waive the deadlines for filing updated cellular system information as announced in the *Report and Order* and postpone the acceptance of applications for unserved areas.

## II. DISCUSSION

2. In its *Report and Order*, the Commission established deadlines for cellular licensees to submit updated (1) maps of their systems showing their existing 39 dBu contours and CGSAs and (2) frequency utilization charts or frequency plans (updated system information).[3] An unserved area is defined as "[a]ny area . . . which is outside of an existing cellular geographic service area in a specific frequency block." *See* 47 C.F.R. §22.2. Therefore, a cellular system's CGSA determines which parts of a given Metropolitan Statistical Area or Rural Service Area constitute unserved areas. Under the Commission's current rules, a licensee must cover seventy-five percent of its proposed CGSA using 39 dBu contours. *See* 47 C.F.R. § 22.903. In its *FNPRM*, however, the Commission proposes to redefine the existing CGSAs of current licensees using a formula that approximates the Carey predicted 32 dBu contour.

3. CTIA contends that "the Commission's present plan [as announced in its *FNPRM*] to redefine CGSAs around a more realistic standard only *after* the unserved application and licensing process has begun will result in years of interference litigation, and marketing uncertainty." *See* CTIA Motion at 3. Because the boundaries for unserved areas are measured by existing cellular licensees' CGSAs, the Commission's proposal would result in a redefinition of the boundaries for unserved areas. We are persuaded that we should temporarily suspend the dates for filing updated system information and postpone acceptance of applications until the Commission has the opportunity to consider CTIA's motion. This action will avoid potentially unnecessary expenditure of staff and licensee resources.

## III. ORDERING PARAGRAPH

4. Accordingly, we are waiving the deadlines for the submission of updated cellular system information as announced in the *Report and Order* and postponing acceptance of applications for unserved areas pending Commission action on CTIA's motion. This action is taken pursuant to Sections 1.3 and 0.291 of the Commission's rules, 47 C.F.R. §§ 1.3 and 0.291.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

## FOOTNOTES

[1] *See* Amendment of Part 22 of the Commission's rules to provide for filing and processing applications for unserved areas in the Cellular Service and to modify other cellular rules, First Report and Order and Memorandum Opinion and Order on Reconsideration, CC Docket Numbers 90-6 and 85-388, FCC 91-306, 6 FCC Rcd 6185 (1991) (Report and Order).

[2] *See* Amendment of Part 22 of the Commission's rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, Further Notice of Proposed Rule Making, CC Docket Number 90-6, FCC 91-311, 6 FCC Rcd 6158 (1991) (FNPRM).

[3] Specifically, the Report and Order sets January 21, 1992 as the deadline for filing updated system information for markets where the five-year fill-in period expires on or before March 20, 1992. *See* Report and Order at 6206 and 6207; *see also* 47 C.F.R. §22.925(c); *see also* 56 Fed. Reg. 58,503 (November 20, 1991); *see also* Public Notice, Report No. CL-92-30 (released December 11, 1991) (in clarifying the dates for filing updated system information, the Common Carrier Bureau announces that "licensees in markets whose five-year fill-in period expires between February 19, 1992 and March 20, 1992, need not file the information required by Section 22.925 until January 21, 1991"). For all other markets, the deadline for filing updated system information is "60 days prior to the expiration of the five-year fill-in period." *See* Report and Order at 6206 and 6207; *see also* 47 C.F.R. §22.925(a). Sections 22.31(a)(1) and (f) of the rules provided initial licensees with a five-year fill-in period during which they could expand their systems within the markets without challenge from competing applications.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-92-018

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States and Bermuda.

## ORDER AND AUTHORIZATION

**Adopted: December 31, 1991; Released: January 9, 1992**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 22, 1991, by TRT/FTC Communications, Inc. (TRT/FTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) and interconnecting facilities for the provision of authorized common carrier services between the U.S. and Bermuda and beyond. The application was placed on public notice on November 6, 1991. No comments were received.

2. TRT/FTC is an international carrier currently providing international services between the U.S. and international points using a mix of cable and satellite facilities, including the PTAT-1 cable system. TRT/FTC is authorized to acquire and operate circuits in the PTAT-1 cable system for service between the U.S. and the United Kingdom, Germany and France and points beyond. It now proposes to acquire and operate an additional one-half interest in one DS-1 circuit (1.544 Mbps) in the PTAT-1 cable. TRT/FTC states that the requested facilities will be used to supplement existing facilities between the U.S. and Bermuda and will not be used to direct any existing traffic to the PTAT-1 cable.

3. The Commission stated in its *Private Submarine Cable Decision*[1] that it would require common carriers wishing to acquire capacity in the PTAT-1 cable system to file applications pursuant to Section 214 of the Communications Act.[2] In this context, we find that TRT/FTC's application contains all of the information necessary under Section 63.01 of the Commission's Rules. [3] Furthermore, we find that TRT/FTC's application does not raise any economic impact issues.[4]

4. Upon consideration of the application and in view of the foregoing, we find that authorization of the requested facilities is required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-018 IS GRANTED, and TRT/FTC is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, and operate the western half-interest in one DS-1 circuit in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cablehead in Bermuda;[5] and

b. use said facilities to provide TRT/FTC's regularly authorized services between the U.S. and Bermuda and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

## FOOTNOTES

[1] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[2] This requirement was restated in the *International Competitive Carrier* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[3] The Commission places no special burdens on any carrier making an application for private cable capacity. *See Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables*, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[4] The Commission stated that it has authority under the public interest mandate of Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of eco-

nomic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

[5] TRT/FTC notes that it will pay the western owners of the PTAT-1 cable system approximately $235,000 and in addition will incur quarterly maintenance charges.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Bay Communications
Complainant,

v. File No. IC-90-03350

New England Telephone Co.
Defendant.

**ORDER**

**Adopted: January 3, 1992; Released: January 9, 1992**

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On December 11, 1989, Bay Communications filed with the Commission the above-captioned informal complaint against New England Telephone Co. (hereinafter "defendant") requesting a refund of alleged excessive access charges collected from Bay Communications by the defendant. Defendant has filed a report in accordance with Section 1.717 of the Commission's Rules, 47 C.F.R. § 1.717, in which it generally denies any violation of the Communications Act or the Commission's rules.

2. On February 28, 1991, complainant filed a request for waiver of Section 1.718 of the Commission's rules, 47 C.F.R. § 1.718, which provides *inter alia*, that a complainant will be deemed to have abandoned its informal complaint if a formal complaint is not filed within six months of the date of the carrier's report. Because the last report in this complaint proceeding was filed on August 31, 1990, complainant could be considered to have abandoned the above-captioned complaint as of March 3, 1991. In support of its waiver request, complainant states that issues central to its complaint are currently pending in two related formal complaint proceedings. *See American Sharecom v. Mountain States Tel.* (File No. E-88-36) and *American Sharecom v. Pac. Northwest Bell* (File No. E-88-37). Complainant argues that it would be redundant and time consuming to require it to institute a formal complaint proceeding at this time since the outcome of the *American Sharecom* proceedings may serve as precedent for resolving the issues in its complaint. The waiver request is unopposed.

3. The "six months" provision of Section 1.718 provides a complainant whose informal complaint has not been satisfied by the carrier's report, the opportunity to pursue further its claims by filing a formal complaint which might otherwise be barred by the two year statute of limitations contained in Section 415 of the Communications Act.[1] The rule is also intended to ensure finality to a controversy within a time certain if no formal complaint is filed. In the instant case, since the carrier's report does not appear to have satisfied the complainant, Section 1.718 would have required the complainant to file a formal complaint by March 3, 1991, to continue to pursue its damage claims.

4. Section 1.3 of the Communication's rules, 47 C.F.R. § 1.3, provides that the rules may be waived for good cause. We conclude that in the instant case, since the outcome of the *American Sharecom* proceedings may impact the resolution of the instant case, and since there has been no disposition of the informal complaint by the Commission, no public purpose would be served by requiring the complainant to file a formal complaint in order to continue to pursue its claim. Therefore, we will grant the requested waiver.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for waiver of Section 1.718 of the Rules, 47 C.F.R. § 1.718, filed by Bay Communications IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] 47 U.S.C. § 415.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| American | Transmittal Nos. 3333, |
| Telephone and Telegraph | 3338, 3339, |
| Company | 3340, 3342, 3345, 3348, |
| | 3351, 3352, 3354, 3355 |

Revisions to Tariff F.C.C. No. 12

**ORDER**

**Adopted: November 29, 1991; Released: November 29, 1991**

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) filed Virtual Telecommunications Network Service (VTNS) Options 93-96 on August 2, 1991 (Transmittal Nos. 3333, 3338, 3339, and 3340), Option 97 on August 5, 1991 (Transmittal No. 3342), Options 98 and 99 on August 6, 1991 (Transmittal Nos. 3343 and 3345), and Options 100-107 on August 8, 1991 (Transmittal Nos. 3348 and 3351-3357). Under these options, AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. [1]

2. MCI Telecommunications Corporation (MCI) filed one petition to reject all of the above transmittals on August 19, 1991. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Transmittal Nos. 3333, 3338, 3339, 3340, 3342 and 3345 on August 19, 1991. Williams Telecommunications Group, Inc. (Williams) and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal Nos. 3333, 3338, 3339 and 3340 on August 19, 1991. Sprint filed a petition to reject or suspend and investigate Transmittal Nos. 3348, 3351, 3352, 3354 and 3355 on August 23, 1991. Williams and CompTel each filed petitions to reject or suspend and investigate the following: Transmittal No. 3342 on August 20, 1991; Transmittal No. 3345 on August 21, 1991; and Transmittal Nos. 3348, 3351, 3352, 3354, and 3355 on August 23, 1991. AT&T filed one reply to all of the above petitions on August 30, 1991.

3. Petitioners make essentially the same arguments against each of the above transmittals. The petitioners focus on the issue of bundling of inbound services in Tariff 12 options in the wake of the Commission's decision in CC Docket No. 90-132. [2] MCI, Sprint, Williams, and CompTel argue that the Commission decided that because the lack of number portability remains a barrier to full competition in 800 and inbound services, AT&T should be precluded from bundling inbound services with other AT&T business services in Tariff 12 options. These petitioners assert that because Options 93-97, 99-102, and 104-105 contain an inbound component and were filed after August 1, 1991, they must be rejected. [3]

4. Williams argues that AT&T has failed to demonstrate that these options are integrated service packages that are "unlike" their component services and thus has failed to justify the discrimination between these options and AT&T's other services. Williams further alleges that even if these options could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and thus are discriminatory.

5. CompTel alleges that, with the exception of Option 96, these options are not generally available because they incorporate geographically deaveraged rates. CompTel further charges that each of these options embodies the unlawful leveraging of AT&T's market power over international services into other sectors. CompTel also asserts that Option 98 is not integrated, claiming that inbound services account for over 90 percent of the revenues from measured charges.

6. AT&T filed one reply in response to the petitions submitted against Options 93-107 arguing that the Commission should permit these options to become effective despite the August 1 action in CC Docket 90-132. AT&T insists that the Commission has used the gradual implementation of new rates and policies as a standard tool to avoid excessively burdening carriers and customers. In response to charges of discrimination, geographic deaveraging, and lack of general availability, AT&T replies that these claims have been raised previously without success and are patently without merit. AT&T argues that CompTel's claim that Option 98 is not integrated is misleading at best because CompTel has considered only measured (switched) usage in its comparison and ignored all the dedicated service elements in the option. AT&T asserts that when Option 98 is considered in its entirety, inbound measured charges account for less than 39 percent of 1991 projected revenues.

7. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 3333, 3338, 3339, 3340, 3342, 3345, 3348, 3351, 3352, 3354, and 3355, the petitions filed by MCI, Sprint, Williams, and CompTel, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. Accordingly, IT IS ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 3333, 3338, 3339, 3340, 3342, 3345, 3348, 3351, 3352, 3354 and 3355, filed

---

[1] See generally Descriptions and Justifications accompanying each transmittal. AT&T subsequently filed Transmittal No. 3508 on October 1, 1991, to withdraw Option 98 (Transmittal No. 3343), and Transmittal No. 3588 on October 30, 1991, to withdraw Options 103, 106, and 107 (Transmittal Nos. 3352, 3356, and 3357).

[2] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (hereinafter "Interexchange Order"). Because the petitions against Options 93-107 were due prior to the release of the *Interexchange Order*, petitioners cite to statements made at the August 1 meeting, comments in the press, and the FCC News Release.

[3] *But see* Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 3333, 3338, 3339, 3340, 3342, 3345, 3348, 3351, 3352, 3354 and 3355, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

9. IT IS FURTHER ORDERED that, for the purpose of advancing the effective date of the transmittals at issue here for American Telephone and Telegraph Company Tariff F.C.C. No. 12, Special Permission No. 91-1045 is assigned and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, ARE WAIVED. These revisions should be filed to be effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Bureau Chief (Policy)
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Ameritech Operating Companies | Transmittal Nos. 499, 500, 501, 509, 526, 535, 557, and 573 |

Revisions to Tariff F.C.C. No. 2

Open Network Architecture

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 26, 1991; Released: December 27, 1991**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION AND BACKGROUND

1. In the *Computer III* proceeding,[1] the Commission initiated a process for replacing the structural separation requirements for Bell Operating Companies (BOCs) enhanced service operations with nonstructural safeguards, including Open Network Architecture (ONA).[2] ONA was designed to unbundle services provided by BOCs to promote efficient and innovative use of the network by independent enhanced service providers (ESPs), while preventing discrimination against ESPs. The Ameritech Operating Companies (Ameritech) filed tariff revisions to make ONA offerings in interstate tariffs.

2. In July 1991, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements to be used by BOCs[3] when implementing their ONA plans.[4] Ameritech sought to implement its ONA plan conditionally, by filing several transmittals prior to the resolution of outstanding issues in the Part 69 ONA docket. Taken together, these filings would unbundle seven basic service elements (BSEs) from existing services, offer fourteen new BSEs,[5] and establish lineside and trunkside basic serving arrangements (BSAs).

3. Ameritech submitted its first ONA filings in December 1990, and the ONA services offered in those filings, as modified by later transmittals, have been examined in depth for the past 12 months. Furthermore, interested parties have had several opportunities to comment on Ameritech's ONA offerings.[6] We have also performed a preliminary *in camera* review of Ameritech's Switching Cost Information System (SCIS) costing model. Implementation of ONA presents difficult and complex issues, including the levels of unbundled rates. For reasons discussed more fully below, we initiate an investigation of the Ameritech ONA transmittals. Those transmittals will, however, become effective on December 31, 1991, following a one-day suspension, subject to an accounting order, in the event that refunds later prove necessary.[7] We will designate issues in this investigation in a later Order.

## II. COST SUPPORT AND RATE LEVELS

### A. Cost Issues

#### 1. SCIS Model

4. *Background.* The *Part 69 ONA Order* adopted a flexible, cost-based approach to ONA pricing that requires BOCs to support rates for BSEs by direct costs plus overheads, including the ratio of direct unit costs to unit investment and direct unit cost to unit price. BSAs are priced residually.[8] To develop its rates, Ameritech employs the Switching Cost Information System (SCIS), a

---

[1] Amendments of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986); *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*). Amendments of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 2 FCC Rcd 3072 (1988) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (*Phase II Reconsideration*), *vacated sub nom.* California v. FCC, 905 F2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Tel. v. FCC, No. 881364 (D.C. Cir. pet. for rev. filed May 16, 1988).

[2] The Commission recently adopted revised safeguards in this area. *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, FCC 91-381, adopted November 21, 1991.

[3] The Bell Operating Companies are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), and US West Communications, Inc. (US West).

[4] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*). The BOCs' ONA plans had been previously approved. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*ONA Amended Plans Order*).

[5] *See* Ameritech Transmittal 557, Description and Justification (D&J), at Exh. 1.

[6] Ameritech's filings, the parties filing pleadings in these proceedings, and the abbreviations by which these pleadings are referenced, are listed in Appendix A of this Order. In this Order, we refer to petitions filed against particular transmittals by transmittal numbers; *i.e.*, Ad Hoc Petition (499/500) at _____; Ad Hoc Petition (557) at _____. Ameritech filed three replies. The first was filed on January 14, 1991, in response to petitions to suspend or reject Transmittals 499, 500, and 501. The second was filed on April 29, 1991, in response to petitions against Transmittal 526, and the third was filed on September 19, 1991, in response to petitions against Transmittal 557. We refer to Ameritech's January reply as Ameritech Reply (January), its April reply as Ameritech Reply (April), and its September reply as Ameritech Reply (September).

[7] This accounting order will apply to all BSA and BSE rates, and thus will facilitate any refunds that might be warranted.

[8] *See Part 69 ONA Order*, 6 FCC Rcd at 4531-32, paras. 38-48.

computer model that simulates a central office switch and apportions its capacity and cost between the functions the switch provides, to develop rates for BSEs. The Bureau's *ONA TRP Order* required the BOCs to provide the SCIS model and associated documentation when filing their ONA tariffs.[9] The affected carriers each sought waiver of this requirement, claiming that carrier and switch vendor data used as inputs to SCIS, and the Bellcore-maintained software that constitutes the model itself, are proprietary information. To review these contentions, the Bureau required one BOC, Ameritech, to submit its SCIS model, and the Bureau staff initiated a detailed *in camera* review of SCIS.[10]

5. *Pleadings.* Various parties argue that their inability to evaluate SCIS prior to the effective date of Ameritech's tariffs has prevented them from evaluating the model as a reasonable basis for rates.[11]

6. *Discussion.* In view of our decision to initiate an investigation, petitioners have not been prejudiced by their inability to use this information in petitions for investigation. We recognize that petitioners who choose to participate in the investigation will need some access to at least some of the data. We will address this subject in a subsequent order.

**2. Compliance with *Part 69 ONA Order* Cost Support Requirements**

7. *Pleadings.* Ad Hoc, MCI, and Allnet argue that Ameritech fails to comply with the cost support requirements set forth in the *Part 69 ONA Order* regarding direct costs. Specifically, Ad Hoc and Allnet argue that Ameritech fails to provide studies, disaggregated costs, and detailed descriptions of its costing methods.[12] Also, MCI argues that Ameritech fails to provide the direct cost studies from which direct costs were derived.[13] Ameritech replies that it provided fully supported cost information in its D&Js for Transmittals 499 and 500. Ameritech further explains that it derives direct costs by applying a direct cost factor to investment.[14]

8. MCI also notes there is no explanation regarding why the ratio of direct cost to unit investment is the same for all Ameritech's BSEs.[15] Ameritech states that, given the shared nature of switching investment, it is impossible to determine any relationships of direct costs to investment for individual BSEs, and Ameritech assumed that each service contributes equally to expenses.[16]

9. Allnet and Sprint assert that Ameritech has set the recurring charge for Call Detail Recording (CDR) at over six times unit recurring costs.[17] Allnet also claims that there appear to be inconsistencies with respect to the pricing of CDR and Flex ANI, and that Ameritech is not applying cost principles consistently to these options in violation of the *Part 69 ONA Order.*[18] Ameritech replies that its cost methodology is consistent for all BSEs and that Allnet may be confused because of Ameritech's treatment of nonrecurring costs for CDR and Flex ANI. Ameritech states that nonrecurring costs for CDR are too great to recover exclusively through nonrecurring charges and that, therefore, some of these nonrecurring costs are recovered through the recurring charges for CDR. Ameritech also states that Flex ANI costs are exclusively nonrecurring and that these costs are recovered exclusively through nonrecurring charges.[19]

10. *Discussion.* In Transmittals 499 and 500, Ameritech developed a direct cost factor on which it based its direct costs, and in Transmittal 557, Ameritech provided those direct costs and displayed them as part of the TRP. Ameritech has achieved substantial compliance with applicable cost support requirements and petitioners have not stated a basis for rejection.

**3. Cost of Money**

11. *Pleadings.* Allnet claims that Ameritech's rates are developed from Cost of Money factor unexplained its cost of money rather than from the Commission prescribed rate of return, and that Ameritech fails to specify the cost of money factor itself.[20] Ameritech explains that the rate paid to debt and equity providers is forward looking, and reflects both the market-determined rate on debt capital, and the market-determined return on equity capital. Ameritech maintains that the rate of return reflects profitability after common overheads have been paid, while the cost of money does not.[21]

12. *Discussion.* At the Bureau staff's request, Ameritech informally submitted additional explanations and documentation in support of its alleged cost of money. In this submission, Ameritech showed its cost of money is 13.5 percent, based on a debt cost of 9.5 percent and an equity cost of 16 percent, and a capital structure of 39.2 percent debt and 60.8 percent equity. In the proceeding leading to the recent *Represcription Order,*[22] Ameritech provided data that showed its cost of debt to be in a range of 7.8 percent

---

[9] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682, para. 3 n. 3 (Com.Car.Bur. 1991) (*ONA TRP Order*), petitions for reconsideration pending. US West uses a similar model that it calls Switching Cost Model (SCM). All general references to SCIS include SCM and all models used to allocate switch investment for BSEs.

[10] Ameritech submitted data for SCIS model offices and documentation for Illinois. On December 9, 1991, Ameritech also filed data for its SCIS model in its other study areas. *See* Letter from Chief, Tariff Division, to M. Suthers, Director of Tariffs, Ameritech, Nov. 26, 1991.

[11] Allnet Petition (499/500) at 7 (arguing that costs appear to be arbitrarily assigned to automatic number identification (ANI) and calling number delivery (CND) features); MCI Petition (557) at 4-5 (SCIS can be manipulated to produce predetermined outcomes); MCI Petition (499/500) at 8-9 (no way to evaluate Ameritech's claim that unit costs remain stable as demand increases).

[12] Ad Hoc Petition (557) at 7; Allnet Petition (557) at 4-5.

[13] MCI Petition (557) at 8-9.

[14] Ameritech Reply (September) at 16-17.

[15] MCI Petition (557) at 8-9.

[16] Ameritech Reply (September) at 16-17.

[17] Allnet Petition (499/500) at 5-6; Sprint Petition (499/500) at 3-4.

[18] Allnet Petition (557) at 8.

[19] Ameritech Reply (January) at 24-25; Ameritech Reply (September) at 1819.

[20] Allnet Petition (557) at 7; *see also* Ad Hoc Petition (557) at 7.

[21] Ameritech Reply (September) at 15-16.

[22] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507 (1990), at App. 1 (*Represcription Order*).

to 8.4 percent, its cost of equity to be 15.5 percent, and its capital structure to be 41.5 percent debt and 58.5 percent equity.[23] In the same Order, the Commission based the authorized rate of return on 8.8 percent cost of debt, a range of 12.5 percent to 13.5 percent for cost of equity, and a capital structure of 44.2 percent debt and 55.8 percent equity. If Ameritech overstates its cost of money, the BSE costs derived from the SCIS model will be likewise overstated, resulting in excessive BSE rates. Accordingly, issues regarding Ameritech's use and calculation of cost of money may be set for investigation in a subsequent Order.

**4. Element-Specific Cost Issues**

13. *Pleadings.* Allnet asserts that Ameritech fails to establish any discrete switching costs associated with providing automatic number identification (ANI) and called number delivery (CND).[24] Allnet claims that Ameritech does not incur discrete, identifiable costs for similar services, such as calling party number (CPN) offered with common channel signalling (CCS)-related out of band signalling,[25] and assumes ANI and CND also have no costs. MCI asserts that Ameritech plans to earn much more revenue from ANI and CND than from the rest of its planned BSEs combined, and believes that the prices for these services are substantially above costs.[26] Ameritech replies that it has previously "established" in defending Transmittals 499 and 500 that there are distinct costs associated with ANI and CND.[27] Ameritech also argues that many of the services cited by Allnet are not analogous to ANI or CND.[28]

14. *Discussion.* ANI and CND do not appear to be similar to the services that Allnet compares to them, and the comparison drawn by Allnet does not provide a basis for investigation.

**5. "Strategic" Pricing**

15. Several petitioners advance arguments against what they characterize as "strategic pricing."[29] Strategic pricing, as that term was applied in the *Strategic Pricing Order*, described the practice of some LECs who priced a particular special access service substantially above cost to discourage customers from migrating from other services.[30] In the present context, no such broad strategy is described by petitioners specifically; rather, they apply the term "strategic" indiscriminately to rates criticized as excessive on a variety of grounds.

**B. Demand Estimation**

16. *Pleadings.* Some petitioners maintain that Ameritech's demand estimates for the proposed BSEs may be understated, leading to overrecovery of costs and excessive rates. MCI argues that demand is relevant to the costs of BSEs, because at some optimal level of demand, the switch should gain efficiencies, thereby causing costs for BSEs to decrease.[31] Ad Hoc and Allnet argue that Ameritech fails to include support for its estimates of demand, and that those petitioners are unable to determine whether those estimates are reasonable.[32] In addition, Sprint complains that Ameritech has underestimated Flex ANI demand, leading to charges far in excess of Ameritech's costs.[33]

17. Ameritech replies that the SCIS-based method of determining costs for BSEs results in unit costs, and levels of demand are therefore irrelevant in computing rates. Ameritech maintains that it has no historical bases from which to estimate demand for new BSEs, and so bases its demand estimates on input from ESPs and interexchange carriers (IXCs). Ameritech further explains that it anticipates low IXC demand for BSEs that were developed primarily for ESPs.[34] With respect to Flex ANI, Ameritech concludes that any question about the demand projections will be answered by the quarterly reports it has to file for new services.[35]

18. *Discussion.* The debate over the relevance of demand levels to unit costs, appears to be primarily an issue of whether the SCIS model is accurate at reasonably anticipated demand levels. We will determine whether demand questions must be examined as part of an investigation of rates in a subsequent order.

**C. Net Revenue Showing**

19. *Pleadings.* MCI also questions the residual-type methodology employed to calculate the LS1 and LS2 rates. MCI claims there is no way to validate that double counting has not occurred using this methodology, and that it produces a revenue neutrality that is nothing more than a mathematical identity.[36]

---

[23] *Id.* at 7512 and App. C.

[24] Allnet Petition (499/500) at 7; Allnet Petition (557) at 5. ANI identifies the telephone number to which the call should be billed. CND identifies the location to which the call is being delivered.

[25] Specifically, Allnet refers to 800 number translation in conjunction with 800 database service, extended super frame (ESF), and CPN. Allnet argues that CPN and ANI are the same in all single line caller cases and most multiline caller cases. *See* Allnet Petition (499/500) at 8; Allnet Petition (557) at 5-6; Letter from R. Morris, Allnet, to Secretary, Federal Communications Commission, Feb. 1, 1991.

[26] MCI Petition (557) at 2-4.

[27] Ameritech Reply (January) at 21-22; Ameritech Reply (September) at 2526.

[28] Letter from B. Gilomen, Ameritech, to Secretary, Federal Communications Commission, Apr. 8, 1991 (CPN is offered only with out of band signalling not at issue here); *see also* Ameritech, Transmittal 557 D&J at 4 (ESF is a BSA alternative, not a BSE). Ameritech's waiver petition to treat ESF as a BSA alternative is now pending.

[29] *See* Ad Hoc Petition (499/500) at 5-10, Allnet Petition (499/500) at 59, Att. 2-3; MCI Petition (499/500) at 1-5; Ad Hoc Petition (509) at 2-5.

[30] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part I, 4 FCC Rcd 4797, 4797-98 (1988) (*Strategic Pricing Order*), *recon.*, 5 FCC Rcd 400 (1990), *vacated sub nom.* Ohio Bell v. FCC, Slip Op., No. 90-3146 (6th Cir., Nov. 21, 1991).

[31] MCI Petition (499/500) at 8-9.

[32] Ad Hoc Petition (499/500) at 8; Allnet Petition (499/500) at 1-5, Allnet Petition (526) at 1; *see also* MCI Petition (499/500) at 9.

[33] Sprint Petition (526) at 3-4.

[34] Ameritech Reply (January) at 11-16.

[35] Ameritech Reply (April) at 13-14.

[36] MCI Petition (557) at 7-8.

20. Allnet contends that Ameritech's demonstration of net revenue is flawed because it reflects only demand when all Local Switching is unbundled, and ignores the demand during the transition period, when some customers would choose feature groups rather than unbundled BSEs. Allnet claims that Ameritech's use of a net revenue test is inappropriate in light of the Commission's decision in the *LEC Price Cap Reconsideration*.[37] Ameritech states that, in compliance with the *LEC Price Cap Reconsideration*, it measures demand for the net revenue test at the end of the transition period.[38]

21. MCI claims that Ameritech does not consistently use the same level of demand in the SCIS model as it used to derive the net revenue test.[39] Ameritech explains that it used total interstate and intrastate demand in its SCIS cost development to ensure that recovery of the total cost of the service will come from all subscribers to the service. Ameritech further asserts that, because it does not anticipate recovering the total costs of service from interstate customers, it must use only interstate demand in its net revenue test. Ameritech stresses that it passes the net revenue test.[40]

22. *Discussion.* Some of petitioners' arguments amount to efforts to seek reconsideration of both the *Part 69 ONA Order* and various price cap decisions. For example, BSAs are priced residually under ONA, *i.e.*, BSEs are priced directly, while BSAs recover residual costs. The revenue neutrality showing must demonstrate that projected overall revenues remain equal with historical revenues without double counting. This tariff proceeding is not an appropriate context in which to reconsider prior Commission Orders. Ameritech has complied with the requirement that it demonstrate the net revenue impact of its filing, established by the Commission in the *LEC Price Cap Reconsideration* and the *Part 69 ONA Order*. An investigation of net revenue impact is not warranted at this time.

### D. Index Issues

23. Allnet asserts Ameritech has not applied price cap rules properly, instead inventing an "aggregate API formula" that is not consistent with Section 61.46(a) of the Commission's Rules.[41] Ameritech replies that its recalculation of its Actual Price Index (API) to reflect the unbundling of Local Switching elements comports with the general methodology in Section 61.46(a), as required by Section 61.46(c), but states that the exact formula of Section 61.46(a) cannot be used because the term for existing prices does not exist, and the ratio of revised to existing price thus cannot be calculated.[42] Ameritech is correct. The API formula in Section 61.46(a) requires new weighted prices to be divided by existing weighted prices, and therefore cannot be applied in those terms when, as here, there are no existing prices.

## III. RATE STRUCTURE ISSUES

### A. Introduction

24. In the *ONA* proceeding the Commission's intent was to permit BOCs to provide enhanced services to local customers without burdensome structural separation requirements, while preventing them from discriminating against their independent ESP competitors. To accomplish this, the Commission required the BOCs, including Ameritech, to submit "ONA Plans" listing the BSEs and BSAs the carriers intended to offer as unbundled, "building block" offerings.[43]

### B. ANI and CND Rate Structures

25. *Background.* Currently, ANI and CND are offered as nonchargeable options of Feature Groups C and D access. Any ANI and CND costs are included in Local Switching (LS) element costs and recovered by a bundled LS rate assessed on each access minute, at both the originating and terminating ends of the call. The Ameritech transmittal would unbundle ANI and CND as separate, optional trunk side BSEs. Rates would include a non-recurring charge and a charge assessed on each originating message.

26. *Pleadings.* Ad Hoc and Allnet assert, in petitions filed before release of the *Part 69 ONA Order*, that the effect of these new rate elements would be a significant increase in the charge for calls of short duration, with little offsetting reduction in the charges for calls of longer duration. They also contend that the unbundled rate elements represent the type of abrupt change that led to the rejection of a per message call setup charge filed by Bell Atlantic.[44] Ameritech replies that ANI and CND are correctly priced on a per message basis, because the information is passed once per originating call regardless of call

---

[37] Allnet Petition (557) at 4. *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration*).

[38] Ameritech Reply (September) at 19 (*quoting LEC Price Cap Reconsideration*, 6 FCC Rcd at 2693).

[39] MCI Petition (499/500) at 8-9.

[40] Ameritech Reply (January) at 13-14.

[41] Allnet Petition (499/500) at 9-10.

[42] Ameritech Reply (January) at 27-28.

[43] Filing and Review of Open Network Architecture Plans, CC Docket No. 882, Phase I, 4 FCC Rcd 1 (1988) (*BOC ONA Order*). The BOCs were also required to explain why any BSAs or BSEs in the plans were missing from their tariffs. *ONA TRP Order*, 6 FCC Rcd at 5684, para. 18. Allnet complains that provisions for BSA missing elements line side and trunk side BSAs required by the *Part 69 ONA Order* are absent from Transmittal 557. Allnet Petition (557) at 1-2. Ameritech in its reply conceded there is no BSA terminology in the filed tariff, and later added language to its tariff to comply with this requirement. Ameritech Transmittal No. 573, 5th revised page 59.1, original page 59.2, 2nd revised page 115, original page 115.1, original page 115.2, 4th revised page 116, 2nd revised page 116.1, 6th revised page 176.2, 34th revised page 214. The Bureau will consider Ameritech's explanations for its missing BSEs, and the missing BSEs of other BOCs, in a future Order. Ameritech has also petitioned for waiver of Part 69 of the Commission's Rules to offer dedicated network access lines (DNALs) as switched access BSA alternatives. Petitions against Ameritech's ONA tariffs raising issues involving DNALs are considered in our companion Order considering Ameritech's waiver request. *See* Ameritech Petition for Waiver of Part 69 of the Commission's Rules, Memorandum Opinion and Order, DA 91-1629, released Dec. 27, 1991 (Com.Car.Bur.).

[44] Ad Hoc Petition (499/500) at 6-9; Allnet Petition (499/500) at 7-9 (*citing* Bell Atlantic Telephone Companies, Trans. No. 310, 4 FCC Rcd 7210 (1989)).

length. It agrees that some originating calls of short duration that use ANI and CND will be more expensive, but states that the filing is revenue neutral, that prices of all terminating calls will decrease, and that the increases for individual customers will be limited to less than 4 percent.[45]

27. *Discussion.* A goal of the ONA program is to unbundle local switching into reasonable, individual rates. Based upon Ameritech's explanations, the assessment of ANI and CND rates on a per message basis does not warrant investigation.

**C. Flex ANI**

28. *Background.* In Transmittals 526 and 535, Ameritech would offer Flexible Automatic Number Identification (Flex ANI) service as a BSE. Flex ANI is a software-based option that will extend the existing ANI service by providing additional values for the ANI Information Indicator digits forwarded to access customers. ANI Information Indicator digits enable customers to identify certain types of calls, *e.g.*, hotels, prisons, and hospitals.[46]

29. *Pleadings.* MCI contends that Flex ANI is a network upgrade for which separate charges should not apply.[47] MCI and Allnet note that other carriers consider Flex ANI an extension of the existing ANI service and thus offer it as a non-chargeable option.[48] Ameritech responds that it is not enhancing an existing service, but creating a new process that has the capability of adding new Information Indicator values. Ameritech also notes that this offering is consistent with the Commission's ONA policy which calls for the unbundling of services so that customers may purchase only those services they require.[49]

30. MCI and Sprint argue that ANI Information Indicator digits are part of software needed to implement equal access, so costs for Flex ANI should be recovered through the Equal Access rate element.[50] Sprint also contends that the Flex ANI software has a useful life of many years, and sound ratemaking policy requires recovery of the associated costs over the life of the program rather than through a separate nonrecurring charge.[51] Allnet and MCI note that Ameritech currently does not charge for hard coding new Information Indicator values, and suggests that it is inconsistent to charge now for the same functionality performed via Flex ANI.[52] According to Ameritech, the Modification of Final Judgment[53] only requires that the BOCs provide access to all IXCs on a non-discriminatory basis, and does not prohibit the BOCs from charging for new services or unbundling exchange access services. Ameritech also argues that only access customers using the service should bear the costs of Flex ANI.[54]

31. *Discussion.* Although Flex ANI was not listed in Ameritech's approved ONA plan, Ameritech filed a petition, on August 21, 1991, for expedited approval of Flex ANI as a BSE. Pursuant to the *Part 69 ONA Order*, Flex ANI was automatically approved as a BSE 45 days later.[55] Flex ANI also appears to be a new service under the price cap rules. The Commission established that any service that expanded the range of service options available to consumers would be considered a "new" service for purposes of the price cap rules. Ameritech's Flex ANI service will expand the range of service options available to consumers, because standard ANI service will continue to be available. Petitioners' arguments appear to amount to objections to the ONA and price cap rules and are therefore not germane to any investigation of Ameritech's tariffs.

**D. Billing and Collection; Related Issues**

32. *Pleadings.* Allnet claims that Ameritech restricts tariffed CDR to 900 Services, while providing an identical function for other services under contracts that vary in price from customer to customer. Allnet maintains that this practice violates the discrimination and tariffing provisions of the Communications Act, and requests that Ameritech be Ordered to eliminate the 900-only restriction.[56] Ameritech replies that, in its ONA plans, CDR was limited to a unique NXX to enable Ameritech's billing systems to identify those calls to be recorded. Ameritech anticipated that ESP industry growth associated with FGD access would principally involve 900 Service, and so tailored CDR to the FGD 900 NXX application.[57]

33. Similarly, Sprint claims that Ameritech's tariffed ANI rate may be discriminatory if Ameritech also provides ANI as part of non-tariffed billing and collection agreements.[58] Ameritech replies that requiring billing and collection to be priced consistently with ANI would be inconsistent with the Commission's policy to keep billing and collection detariffed, and that billing and collection costs are allocated by Subpart D and E of the Part 69 Rules.[59]

34. *Discussion.* The Commission detariffed CDR in the *Billing and Collection Order*, although the Commission retained Title I jurisdiction to require the continued pro-

---

45 Ameritech Reply (January) at 22-24.

46 Ameritech Transmittal 526, D&J at 1-2. Bellcore develops industry standard codes for the Information Indicator digits. Currently, ANI Information Indicator digits are "hard-coded" into the switch program. In other words, the values for ANI Information Indicator digits are placed in the switch program at the time of manufacture and can only be changed during switch program updates. Flex ANI, as discussed above, is a software approach to ANI Information Indicator digits that will allow greater flexibility to add new values. *See* Ameritech Reply (April) at 3.

47 MCI Petition (526) at 4-5.

48 *Id.* at 7-8; Allnet Petition (526) at 1.

49 Ameritech Reply (April) at 3-7.

50 Sprint Petition (526) at 5-6; MCI Petition (526) at 5.

51 Sprint Petition (526) at 5.

52 Allnet Petition (526) at 1; MCI Petition (526) at 6.

53 United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

54 Ameritech Reply (April) at 4-8.

55 *See Part 69 ONA Order*, 6 FCC Rcd at 4527, para. 14.

56 Allnet Petition (499/500) at 6 (*citing* Sections 202(a) and 203 of the Communications Act, 47 U.S.C. §§ 202(a), 203).

57 Ameritech Reply (January), App. 2 at v-vii.

58 Sprint Petition (557) at 5.

59 Ameritech Reply (September) at 26 (*citing* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Notice of Proposed Rulemaking, 6 FCC Rcd 3506, 3509, para. 24 & n. 12 (1991)). Sprint's comments on ANI are speculative, and only raise the possibility that ANI may be provided under billing and collection agreements.

vision of CDR to all IXCs at reasonable rates upon reasonable request.[60] This specific exercise of Title I jurisdiction was to end in 1989, or when conversion to equal access was completed, whichever occurred later.[61] Nevertheless, the Commission retained the power to exercise Title I jurisdiction whenever such exercise would protect or promote a statutory purpose.[62] In this case, Ameritech is proposing to reintroduce CDR into its tariffs. While Ameritech did apparently include CDR in its ONA plan, it is questionable that it can properly be tariffed in light of the Commission's *Billing and Collection Order*, and Rules.[63] Therefore, this offering appears to warrant investigation.

**E. Simplified Message Desk Interface**

35. Sprint complained in response to Ameritech's initial ONA tariffs, Transmittals 499 and 500, that the Simplified Message Desk Interface (SMDI) DNAL will be available only in certain central offices, and a customer wishing to use the BSEs associated with SMDI will need a DNAL between its premise and each central office the customer seeks to access.[64] Sprint's contention is mooted by the availability of SMDI/E in Transmittal 509. With SMDI/E service, the customer can obtain access to all SS7-equipped end offices when it purchases a DNAL to one of those offices.

**F. Availability of BSEs with Line Side BSAs**

36. Sprint asserts neither ANI nor CDR will be available with line side access, although these functions are necessary for ESPs to bill end users who are casual callers. Although Ameritech states it is conducting trials to determine its ability to record, deliver, and bill the call detail recording information for the line side arrangement, Sprint complains that Ameritech does not suggest when or whether this capability may become available.[65] Ameritech replies that ANI is not technically compatible with line side connection, and efforts to develop line side capable CDR have encountered problems.[66]

37. There is no dispute that the technology does not currently exist to provide cost-effective line side ANI and CDR. We expect to monitor technological developments permitting the expansion of functions available to ESPs.

## IV. IMPLEMENTATION ISSUES

**A. Transition Period**

38. The *Part 69 ONA Order* provides for a transition period, during which both bundled Feature Groups and unbundled ONA services will be available. The Commission concluded that this transition period should end when the ONA service rates are incorporated into the carriers' price cap indexes.[67] For Ameritech, this will occur on July 1, 1992.

**1. Conversion**

39. *Pleadings.* Allnet questions Ameritech's lack of any charge for conversion of customer service from bundled to unbundled arrangements. Allnet suggests that there must be some costs associated with this conversion. Allnet asserts that, in fairness, these costs should be borne only by customers who convert voluntarily. According to Allnet, conversion should be provided without charge only when conversion is required; *i.e.*, on the last date of the transition. Allnet also contends that Ameritech misinterprets the *Part 69 ONA Order* by forcing customers to make a single choice between bundled and unbundled service for the entire Ameritech territory. Allnet believes that this "all or nothing" approach is especially unfair to IXCs who are also ESPs, and requests that ONA services be available during the transition period on a trunk group basis.[68] Ameritech replies that no separate costs are attributable to early conversion and asserts it does not want to penalize access customers for conversion. In fact, argues Ameritech, it projects a slight decrease in overall revenue after unbundling.[69] Ameritech also offers to permit unbundling on a state-by-state basis, but argues that conversion by trunk group is extremely unlikely and, if permitted, would permit "gaming" the system, and would result in revenue shortfalls and increased costs.[70]

40. *Discussion.* The *Part 69 ONA Order* requires BOCs to offer unbundled arrangements of their feature groups. That Order represents the culmination of the Commission's history of encouraging ONA development. Allnet presents no evidence that Ameritech incurs any additional costs in converting from bundled to unbundled arrangements over the transition rather than in a complete unbundling at the end of the transition. Indeed, Allnet's proposed alternative would discourage an orderly, gradual transition by creating artificial incentives to postpone ONA implementation. Therefore, the Bureau concludes that Allnet offers no argument warranting rejection or investigation of Ameritech's ONA tariffs on this basis. Conversion on a state-bystate basis should allow customers an adequate degree of flexibility without the possible abuses and costs of conversion on the basis of trunk groups.

**2. Timetables for Unbundling**

41. *Background.* Because Ameritech voluntarily filed its ONA tariff ahead of the other BOCs, it is scheduled to take effect before January 1, 1992. Under the *Part 69 ONA Order*, one result would be that the transition to fully unbundled ONA rates would be implemented on July 1, 1992, one year earlier than for other BOCs.

---

[60] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150, 1173-75 (1986) (*Billing and Collection Order*).

[61] *Id.* at 1174, para. 46.

[62] *Id.* at 1170, para. 37.

[63] *See* Section 69.3(e)(9) of the Commission's Rules, 47 C.F.R § 69.3 (e)(9).

[64] Sprint Petition (499/500) at 3.

[65] Sprint Petition (499/500) at 2-3.

[66] Ameritech Reply (January) at App. 2, vii-viii.

[67] *Part 69 ONA Order*, 6 FCC Rcd at 4528, para. 20.

[68] Allnet Petition (557) at 3-4.

[69] Ameritech Reply (September) at 23-24.

[70] Letter from A.M. Alessi, Ameritech, to R.L. Smith, Tariff Division, November 26, 1991.

42. *Pleadings.* Sprint suspects that Ameritech has underestimated both the scope of implementation problems and the costs of unbundling services, especially when certain features and functions are made available to a relatively large group of customers, such as ESPs.[71] Sprint contends that Ameritech has not yet specified ordering and billing standards for ONA offerings.[72] Allnet contends that small carriers are particularly disadvantaged by a short transition period, because they are less able to adapt their ordering and billing systems.[73] According to Sprint, ONA implementation could increase ESP demand for Carrier Identification Codes (CICs).[74] Ad Hoc is concerned that ONA implementation in Ameritech's service region before ONA is implemented in the rest of the Nation will create Regional Anomalies unbundling timing regional anomalies for carriers with ordering and other procedures that cover multiple regions. Ad Hoc also claims that Ameritech's early filing reduces the ability of the Commission and interested parties to assess the reasonableness of Ameritech's rates by comparing them to rates filed by other carriers.[75]

43. Ameritech responds that the July 1992 date is consistent with the explicit language in the *Part 69 ONA Order*, which pegged transition to inclusion of ONA elements under price caps rather than any specific date. Ameritech argues that the transition period established by the *Part 69 ONA Order* is not a proper object for relitigation in the tariff context.[76] Ameritech also contends that the changes required to Ameritech's billing and ordering systems are not extensive. Ordering forms already have fields in which to specify unbundled BSEs; new fields need to be developed only for new BSEs. Ameritech began to meet with IXCs in February 1989, to prepare for these new billing and ordering procedures.[77] Ameritech states that the Commission should judge the reasonableness of ONA rates on their own merits, and that BSE rates may vary between BOCs because the carriers may each employ a different array of technologies. Ameritech also does not expect ESP demand for unbundled elements to accelerate demand for CICs significantly.[78]

44. *Discussion.* Ameritech is correct, that this is not the appropriate forum for reconsideration of any of the provisions of the *Part 69 ONA Order*, including the unbundling timetable. The petitions on this subject do not identify any issue that warrants investigation.

### B. ESP Exemption

45. *Pleadings.* Prodigy and BT Tymnet assert that Transmittals 499 and 500 (and Transmittal 501 for Prodigy) affect the ability of ESPs to avoid interstate access charges. BT Tymnet contends that Ameritech prices its BSAs in a similar manner to bundled Feature Group services, thus forcing ESPs to pay carrier access charges.[79] Prodigy contends that Ameritech's "radically revised rates... could seriously undermine the continued provision of innovative services."[80] Ameritech responds that its tariff revisions would not limit ESPs' ability to obtain local business lines, but would require that ESPs that use interstate access components pay certain charges -- as already required. The ESP access charge exemption permits enhanced service providers to use local exchange components in the offering of interstate services, but has never permitted ESPs to purchase components from federal access tariffs and combine those components with intrastate access in order to avoid interstate access charges.[81]

46. *Discussion.* In the *Part 69 ONA Order*, the Commission decided to retain the ESP exemption from federal access charges in order to avoid rate shock and disruptions in the rapidly changing enhanced services industry, and to provide predictability and stability for the industry in the transition to ONA.[82] Since the implementation of federal access charges, ESPs have been allowed to use local business lines or other state-tariffed forms of access for their interstate traffic, enabling them to avoid interstate access charges. While ESPs are not permitted to use interstate access elements in conjunction with intrastate services, they may purchase interstate access service on the same basis as other access customers to obtain other interstate features available through this access service. Therefore, BT Tymnet and Prodigy pleadings on this subject have not presented an issue for investigation.

## V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, that the petitions for rejection or suspension and investigation of Ameritech Operating Companies Transmittal Nos. 499, 500, 509, 526, 535, 557, and 573, filed by the parties listed in Appendix A of this Order, ARE GRANTED, to the extent indicated above, and otherwise ARE DENIED.

48. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), an investigation is instituted into the

---

[71] Sprint Petition (557) at 1-4; *see also* Ad Hoc Petition (557) at 3-4.

[72] Sprint Petition (557) at 2-3.

[73] Allnet Petition (557) at 2.

[74] Sprint Petition (557) at 3 n. 3.

[75] Ad Hoc Petition (557) at 4-8.

[76] Ameritech Reply (September) at 4-5.

[77] Ameritech also states that its billing changes were approved by the Billing Output Specifications Technical Review Group (BOSTRG), so that these are available for immediate use by Ameritech; they generally involve provisions used to explain billing. Sample ONA bills and customer service records were supplied the IXCs for trial runs in January 1991, and no IXC has complained of any billing difficulties encountered in these trial runs. *Id.* at 8-9.

[78] *Id.* at 7-8. Ameritech points out that CICs are used to route calls to Feature Group B or Feature Group D services and that ESPs have had the ability to order such services prior to the initiation of ONA. *Id.* at 10 n.18.

[79] BT Tymnet Petition (499/500) at 5-8. BT Tymnet also criticizes Ameritech for seeking a waiver for its unbundled BSE services prior to the release of the *Part 69 ONA Order*. BT Tymnet Petition (499/500) at 4-6. As explained, *supra*, the Commission found issues related to Ameritech's waiver request to be moot in the *Part 69 ONA Order*. *See* 6 FCC Rcd at 4537, para. 73.

[80] Prodigy Petition (499/500) at 5.

[81] Ameritech Reply (January) at 7-9.

[82] *Part 69 ONA Order*, 6 FCC Rcd at 4535, para. 60.

lawfulness of the tariff revisions filed by the Ameritech Operating Companies in Tariff F.C.C. No. 2, Transmittal Nos. 499, 500, 509, 526, 535, 557, and 573.

49. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions contained in Transmittal Nos. 499, 500, 509, 526, 535, 557, and 573 ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

50. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL FILE tariff revisions reflecting this suspension no later than 10 days from the release date of this Order. The Ameritech Operating Companies may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 91-1152.

51. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Ameritech Operating Companies shall keep accurate account of all earnings, costs, and returns associated with the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

**APPENDIX A**

**Parties Filing Pleadings in Response to Ameritech's ONA Tariffs**

I. Ameritech Petition for Waiver of Sections 69.106(b) and 69.205(c) of the Commission's Rules, filed June 26, 1990.

A. Parties Filing Comments:

Ad Hoc Telecommunications Users Committee (Ad Hoc)
ADAPSO
Allnet Communications Services, Inc. (Allnet)
BT Tymnet, Inc. (BT Tymnet)
California Public Utilities Commission
MCI Telecommunications Corp. (MCI)
US Sprint Communications Company Limited Partnership (Sprint)
Ameritech States
New England Telephone and Telegraph Company and New York Telephone Company (NYNEX)

B. Party Filing Reply:

Ameritech

II. Ameritech Transmittals 499, 500, and 501, filed December 18, 1990.

A. Parties Filing Petitions to Reject or Suspend and Investigate:

Allnet
Alarm Industry Communications Committee
BT Tymnet
MCI
Prodigy Services Company (Prodigy)
Sprint

B. Party Filing Reply:

Ameritech

C. Bureau Releases Order regarding Transmittal 501, 6 FCC Rcd 2085 (Com.Car.Bur. 1991).

III. Ameritech Transmittal 509, introducing SMDI/E Service, filed January 16, 1991.

A. Party Filing Petition to Reject or Suspend and Investigate

Ad Hoc

B. Party Filing Reply

Ameritech

IV. Ameritech Transmittal 526, introducing Flex ANI Service, filed April 2, 1991.

A. Parties Filing Petitions to Reject or Suspend and Investigate:

Allnet
MCI
Sprint

B. Party Filing Reply:

Ameritech

V. Ameritech Transmittal 535, filed May 15, 1991.

VI. Ameritech Transmittal 557, filed August 23, 1991.

A. Parties Filing Petitions to Reject or Suspend and Investigate:

Ad Hoc
Allnet
MCI
Sprint

B. Party Filing Reply:
Ameritech

VII. Ameritech files an amendment to Transmittal 557, October 29, 1991.

VIII. Ameritech Transmittal 573, filed November 1, 1991.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GEN Docket No. 84-1234**

In the Matter of

Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services

In the Matter of
the Applications of

| | |
|---|---|
| GLOBAL LAND MOBILE SATELLITE, INC. | File Nos. 1625/1626-DSS-P/L-85 |
| GLOBESAT EXPRESS | File Nos. 1627-DSS-P/L-(50)-85<br>1628-DSS-P-(5)-85 |
| HUGHES COMMUNICATIONS MOBILE SATELLITE, INC. | File No. 1629-DSS-P/L-85 |
| MCCA AMERICAN SATELLITE SERVICE CORPORATION | File Nos. 1630-DSS-P/L-85<br>1631-DSS-P-85 |
| McCAW SPACE TECHNOLOGIES, INC. | File No. 1632-DSS-P/L-85 |
| MOBILE SATELLITE CORPORATION | File Nos. 1633/1634/1635-DSS-P/L-85 |
| MOBILE SATELLITE SERVICE, INC. | File Nos. 1636/1637-DSS-P/L-85<br>1638-DSS-P-85 |
| NORTH AMERICAN MOBILE SATELLITE, INC. | File Nos. 1639-DSS-P/L-85<br>1640-DSS-P-85 |
| SATELLITE MOBILE TELEPHONE CO. | File Nos. 1646/1647-DSS-P/L-85 |
| SKYLINK CORPORATION | File Nos. 1648/1649-DSS-P/L-85 |
| TRANSIT COMMUNICATIONS, INC. | File Nos. 1650/1651-DSS-P/L-85<br>1652-DSS-P-85 |

**FINAL DECISION ON REMAND**

**Adopted: December 27, 1991; Released: January 6, 1992**

By the Commission:

**TABLE OF CONTENTS**


| Topic | Paragraph No. |
|---|---|
| I. INTRODUCTION | 1 |
| II. BACKGROUND | 2 - 4 |
| III. DISCUSSION | 5 - 57 |
| A. Consortium Requirement | 7 - 34 |
| 1. Legal Authority | 7 - 24 |
| 2. Considerations Justifying the Consortium Requirement | 25 - 34 |
| B. Criteria for Participation in the Consortium | 35 - 40 |
| C. Technical Considerations | 41 - 49 |
| D. Other Issues | 50 - 55 |
| 1. *Ex Parte* Communications | 50 |
| 2. Notice and Comment Procedures | 51 |
| 3. Needs of Aviation | 52 - 53 |
| 4. Omninet's Application | 54 - 55 |
| E. Affirmation of AMSC as Authorized Licensee | 56 - 57 |
| IV. CONCLUSION | 58 |
| V. ORDERING CLAUSES | 59 - 64 |
| APPENDIX | |


## I. INTRODUCTION

1. This *Final Decision* resolves issues raised by the court remand of several Commission orders related to the licensing of a domestic mobile satellite service ("MSS") provider in the upper L-band frequencies.[1] After carefully reviewing the *ARINC* Court's instructions as well as comments submitted by interested parties. we generally affirm our tentative conclusions concerning the remand issues as outlined in our recent *Tentative Decision* in this proceeding.[2] Specifically, we conclude that the Commission has statutory authority to adopt in appropriate circumstances a licensing rule which requires that service be provided by a consortium comprised of all willing and eligible applicants in lieu of holding comparative hearings. Next, we conclude that compelling factors unique to this MSS licensing proceeding indicate that the mandatory consortium approach, rather than comparative hearings. will best serve the public interest in these circumstances. In our judgment, a consortium of eligible applicants represents the best, and perhaps the only opportunity for the United States to enjoy an efficient technologically sound

and viable mobile satellite service in the upper L-band spectrum. To this end, active and immediate participation by an authorized licensee is critical to the success of ongoing U.S. efforts to secure scarce spectrum through the international coordination process for a domestic mobile satellite service in the upper L-band. In addition, we modify the financial requirements previously imposed for participation in the consortium to permit the three entities whose applications were reinstated by the court an opportunity to join the consortium at this time. We also address and reject certain procedural challenges and other objections raised by commenters opposed to the consortium requirement. Finally, in light of our conclusions described above, we affirm American Mobile Satellite Corporation ("AMSC") as the authorized licensee to construct, launch and operate a mobile satellite system in the upper L-band, subject to certain terms and conditions outlined in prior Commission orders as modified herein.

## II. BACKGROUND[3]

2. In 1986 the Commission, through notice and comment Rule Making procedures, reallocated a portion of spectrum in the upper L-band for MSS purposes.[4] A year later, again by Rule Making, the Commission established licensing procedures and eligibility criteria for applicants for the proposed new mobile satellite service.[5] Specifically, the Commission determined that the public interest would best be served by granting the MSS license to a consortium composed of all willing, qualified applicants, and that each applicant would demonstrate its financial qualifications by making a $5 million cash contribution into the consortium. Subsequently, eight applicants satisfied these eligibility criteria by forming a consortium (now named AMSC) and making the requisite individual financial contributions. In 1989 the Commission authorized AMSC to construct, launch and operate an MSS system in the upper L-band.[6] The Commission concurrently affirmed a prior Common Carrier Bureau decision dismissing the applications of Global, Globesat and MSSI for failure to comply with the financial qualification criteria.[7] The three dismissed applicants sought review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit.

3. In March 1991, the court of appeals remanded the MSS licensing proceeding to the Commission with instructions to further consider two aspects of the Commission's decisions.[8] First, the court faulted the manner in which the Commission had required the applicants to demonstrate their financial qualifications by making a cash contribution.[9] Second, the court vacated the Commission's consortium rule for failure to provide sufficient justification for adopting the consortium licensing requirement rather than holding comparative hearings concerning individual applicants.[10] The court also reversed the dismissal of the Global, Globesat and MSSI applications.[11]

4. Following the court's decision, the Commission invited those parties directly affected by the decision to submit their views as to how the Commission should proceed on remand.[12] After reviewing those comments, and the *ARINC* Court's decision, the Commission in August 1991 issued its *Tentative Decision* offering tentative conclusions concerning the remand issues. The Commission solicited comment on those tentative conclusions, and indicated that a *Final Decision* resolving the remand issues would issue within 180 days.

## III. DISCUSSION

5. The *Tentative Decision* was our preliminary response to the issues raised by the *ARINC* Court. In that response, we concluded that the Commission has statutory authority to adopt in appropriate circumstances a licensing rule which requires that service be offered only by a consortium of willing and eligible applicants. We also concluded tentatively that the consortium requirement was a reasonable exercise of our Rule Making authority, and that compelling circumstances unique to the MSS licensing proceeding justified the mandatory consortium rule.

6. We affirm those conclusions in this *Final Decision*. The *Tentative Decision*, which contained an extensive analysis of legal issues and set forth in detail the reasons supporting our tentative conclusions, serves as the basis for our *Final Decision* herein. Although we do not repeat that analysis in full in this *Final Decision*, we adopt and incorporate by reference the reasoning outlined in the *Tentative Decision* except where specifically noted below. For the sake of clarity, we briefly summarize by issue the major points made in the *Tentative Decision*, and then address comments submitted by interested parties in response to the *Tentative Decision*.

### A. Consortium Requirement

#### 1. Legal Authority

7. As a threshold matter, the *ARINC* Court directed the Commission to consider whether it has authority to impose a consortium in lieu of holding comparative hearings. As discussed below, we conclude that the Commission, consistent with the Communications Act (the "Act"), may adopt a licensing rule requiring service by a consortium of willing and eligible applicants in appropriate circumstances.

8. *Tentative Decision*. We outlined the basis for this conclusion in the *Tentative Decision*.[13] We began by discussing the statutory hearing requirement of section 309(e) of the Act,[14] which provides that the Commission may not deny an application without affording an opportunity for hearing.[15] We observed that the right to a "comparative" hearing under section 309(e), which developed from the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*,[16] is not absolute, and identified exceptions to the *Ashbacker* doctrine as recognized by the courts and Congress. We emphasized that, in determining that the consortium licensing approach would best serve the public interest in this instance, the Commission exercised its Rule Making authority consistent with the Supreme Court's holding in *U.S. v. Storer Broadcasting* [17] to establish a threshold eligibility criterion for MSS license applicants.

9. We next discussed the Commission's general Rule Making authority under the broad public interest standard embodied in the Communications Act.[18] We surveyed Supreme Court decisions which recognize that the Commission possesses broad discretion under the statutory public interest standard, and may implement its view of that standard so long as that view is based on consideration of permissible factors and is otherwise reasonable.[19]

We concluded that the Commission was authorized to adopt the consortium rule pursuant to the broad public interest standard.

10. We further examined the public interest standard in the specific context of common carrier satellite licensing.[20] We observed that the Commission has not awarded satellite licenses through comparative hearings in the past due to public interest considerations that are unique to satellite services. We emphasized the contrast between satellite licensing on the one hand, in which the Commission has a longstanding, deliberate and well-known practice of avoiding comparative hearings, and the terrestrial broadcast services on the other, where the Commission traditionally has employed comparative hearing procedures to award licenses. We noted that the court of appeals, in a context not involving mutually exclusive applicants, has approved the Commission's general policy of avoiding administrative hearings in satellite licensing.[21] We further noted that the Commission consistently has interpreted the statutory public interest standard as permitting it to require a consortium for satellite and common carrier services in certain circumstances, and has in fact required such consortia in limited instances.[22] In light of these factors, we concluded that our use of a consortium instead of comparative hearings in the satellite context is a permissible exercise of our broad Rule Making authority under the public interest standard of the Communications Act.

11. *Comments*. Five parties commented on this issue. ARINC/ATA, Global, Globesat and MSSI dispute the Commission's tentative conclusion that it has authority to require a consortium of eligible applicants in lieu of comparative hearings.[23] AMSC contends that the Commission has the requisite authority.[24]

12. Commenters opposing the mandatory consortium requirement argue that the Commission must hold comparative hearings to select among mutually exclusive applicants in all cases, unless specific statutory authority exists for using an alternative selection method such as a lottery. These parties contend that the Communications Act provides only two specific methods for selecting among mutually exclusive applicants: comparative hearings and lotteries. Since no statutory provision explicitly authorizes the Commission to adopt a consortium rule, these parties maintain that the Commission is prohibited from requiring a consortium of eligible applicants in the MSS licensing proceeding.[25]

13. In addition, these commenters challenge the Commission's general Rule Making authority as a basis for imposing a mandatory consortium. In this regard, these commenters criticize the Commission's reliance on the *Storer* decision.[26] *Storer*, these parties maintain, permits the Commission to narrow the field of mutually exclusive applicants, but does not enable the Commission to avoid comparative hearings altogether by requiring that willing, *bona fide* applicants join a consortium. Global argues that rather than narrowing the field of *bona fide* applicants, the Commission's consortium requirement effectively establishes the applicant itself and eliminates any opportunity for an individual applicant to argue the superiority of its individual application.[27]

14. Moreover, these commenters argue that no exception to the hearing requirement exists in the context of satellite licensing. These parties maintain that the Commission has not held comparative hearings in prior satellite proceedings because there has been enough spectrum and orbital locations to accommodate all applicants and thus no problem of mutual exclusivity arose.[28] They also dismiss prior instances cited in the *Tentative Decision* in which the Commission required a consortium in the satellite context, arguing that these examples either did not involve mutually exclusive applicants or carry no precedential effect since they were not subjected to appellate review.[29]

15. *Decision*. As a threshold matter, we note that commenters have failed to identify any specific statutory provision supporting their contention that the Commission is prohibited from employing a mandatory consortium licensing rule. Section 309(e) does not stand for such a flat prohibition. The *ARINC* Court itself interpreted that section only to establish a "presumption" in favor of comparative hearings.[30] Moreover, section 309(e) does not mandate hearings in all circumstances, nor preclude us from addressing in Rule Making all significant public interest considerations that affect our licensing decisions. Indeed, as the court of appeals has recognized, the Supreme Court implied in the *Ashbacker* decision itself that the Commission could, without a hearing, grant one of two competing applications for a permanent license "if it found that the public interest demanded such urgency."[31] Further, as the court of appeals has made clear subsequent to our *Tentative Decision*, the *Ashbacker* Court did not dictate that the Commission open a frequency for competing applications whenever it makes a new frequency available.[32]

16. Moreover, the very nature of the remand in this case undermines the commenters' assertions that the Commission is prohibited from adopting a mandatory consortium of all qualified applicants simply because the Communications Act does not expressly provide for the use of consortia in licensing proceedings. In this regard, AMSC observes that the *ARINC* Court remanded this issue to the Commission with full knowledge that the Communications Act does not expressly authorize the use of consortia.[33] If the issue turned on the absence of statutory language explicitly authorizing a mandatory consortium, no purpose would be served by following the court's instructions to further consider the Commission's statutory authority to impose a consortium requirement.

17. As we discussed in detail in the *Tentative Decision*, we believe we may adopt a mandatory consortium licensing requirement pursuant to our broad authority under the Communications Act to prescribe reasonable rules in the public interest. The Supreme Court's decision in *Storer* supports our conclusion. In *Storer*, the Court held that the hearing requirement of section 309(e) of the Act, as interpreted by *Ashbacker*, does not withdraw the Commission's Rule Making authority.[34] Under *Storer*, the Commission may adopt rules in the public interest establishing licensing eligibility criteria which effectively preclude a hearing under section 309(e) for those applicants who do not satisfy the prescribed eligibility requirements.[35] That is exactly what we are doing in this MSS licensing proceeding: the Commission has determined through notice and comment Rule Making that the public interest will best be served by requiring a consortium of all willing and qualified applicants, and, consistent with *Storer*, has established the consortium requirement as a threshold eligibility criterion for MSS licensing purposes.[36] The consortium requirement represents the Commission's judgment that a joint venture of all willing and eligible applicants will best serve the public interest in

these circumstances. As such, the consortium requirement is fundamentally an eligibility criterion that applies even-handedly to all applicants. No application satisfying the eligibility requirement is denied; all *bona fide* applicants may participate in the licensed MSS consortium.[37] As we emphasized in the *Tentative Decision*, this procedure is fully consistent with *Storer* and thus satisfies the established legal requirement for denying any MSS applications that do not meet the consortium eligibility requirement.[38]

18. We reject Global's contention that the consortium requirement eliminated any opportunity for an individual applicant to demonstrate the technical superiority of its individual proposal.[39] A central purpose of the MSS Rule Making proceeding was to evaluate technical options, through the proposals submitted by any prospective MSS applicants, to determine what, if any, technical requirements we should impose on the MSS system. Through comments submitted in the Rule Making, prospective applicants thus were invited, and had a full opportunity, to argue the merits of various technical options represented by their proposals. Rule Making procedures are well-suited to resolution of such issues and, indeed, the Commission routinely decides such broad technical issues through Rule Making.[40]

19. Commenters criticizing the discussion in the *Tentative Decision* concerning the Commission's historical practice of avoiding comparative hearings in satellite licensing misapprehend the thrust of that discussion. The Commission did not assert that comparative hearings are never appropriate in the context of satellite licensing. Rather, this discussion addressed whether, under the broad public interest standard of the Act, comparative hearings are required by statute as the "exclusive means" of effectuating the public interest in the context of common carrier satellite licensing.[41] The discussion noted that, due to a number of public interest considerations, the Commission consistently has avoided hearings, comparative or otherwise, in satellite licensing proceedings, and has adopted a mandatory consortium requirement in certain limited instances in the satellite and common carrier services. While commenters correctly observe that there is no judicial precedent affirming our prior use of consortia in the satellite context, these prior administrative decisions are relevant to the issue of the Commission's historical view of its public interest obligations under the Act, even when faced with mutually exclusive satellite applications.[42]

20. The fact that mutual exclusivity generally was not present in the Commission's prior satellite licensing proceedings does not diminish the relevance of the Commission's longstanding practice of avoiding administrative hearings in satellite licensing as a means of advancing the public interest. As we noted in the *Tentative Decision*:

> [I]n some situations the Commission adopted policies for satellite service that accommodated all who applied, and thus there was no situation of mutual exclusivity. These policies, however, clearly underscore the lengths to which the Commission went in order to avoid administrative hearings for satellite authorizations.[43]

Thus, the Commission's historical practice evidences a consistent and longstanding view that the Communications Act does not establish comparative hearings as the exclusive means of effectuating the public interest in satellite and common carrier licensing proceedings. This history is fully consistent with the view that the Commission may adopt a mandatory consortium requirement under its broad Rule Making authority.[44]

21. Finally, we address the relevance to this proceeding of section 309(i) of the Act,[45] which authorizes the Commission in some circumstances to grant an initial license or construction permit to a qualified applicant through the use of a system of random selection, *i.e.*, a lottery. Although we originally stated that it was "not clear" that the statutory requirements for using a lottery could be met in this instance,[46] upon further reflection we expressed the view in the *Tentative Decision* that we could use a lottery.[47] We affirm herein our tentative conclusion that use of a lottery in this MSS licensing proceeding would be permissible. As we observed in the *Tentative Decision*, in authorizing the selection of licensees purely by random selection, Congress indicated in the legislative history that lotteries might be used for satellite services in lieu of comparative hearings.[48]

22. Our conclusion that use of a lottery in this proceeding is consistent with the Communications Act, however, does not mean, as MSSI contends, that a lottery is the most appropriate selection method in these circumstances.[49] For reasons outlined in the *Tentative Decison*,[50] we continue to believe that a consortium of all eligible applicants will best serve the public interest and is preferable to a licensee established through random selection.[51]

23. In one important sense, the lottery provision contained in section 309(i) is instructive to the resolution of the basic authority question in this case. That provision is a clear indication that Congress does not consider the comparative hearing process the exclusive means of effectuating the public interest.[52] As we explained in the *Tentative Decision*:

> Congress' assessment in the lottery amendments of the public benefits of comparative hearings, in comparison to the benefits of expediting service to the public, lends support to the manner in which we have balanced public interest factors in the MSS Rule Making proceeding, through our similar determination that an overriding public interest in prompt authorization of MSS -- by a consortium -- outweighs the benefits of comparative hearings.[53]

The 1982 lottery amendments did not purport to alter our pre-existing Rule Making authority under the public interest standard, nor is our action in adopting the consortium requirement inconsistent with policies reflected in section 309(i).[54] Thus, we view Congress' enactment of the lottery provision as consistent with our determination through the exercise of our Rule Making authority that a mandatory consortium in lieu of comparative hearings will best serve the public interest.[55]

24. *Conclusion.* In sum, we find no statutory prohibition to our use of a consortium in these circumstances. We find on the contrary that our adoption of a consortium requirement is a permissible exercise of our Rule Making authority under the broad public interest standard, and is consistent with our longstanding practice of avoiding administrative hearings in common carrier and satellite licensing proceedings. We therefore conclude that the Commission has authority to adopt in appropriate

circumstances a licensing rule which requires that service be provided by a consortium comprised of all willing and eligible applicants.

**2. Considerations Justifying the Consortium Requirement**

25. The *ARINC* Court held that any departure from holding comparative hearings to select among mutually exclusive applications must be premised on "truly compelling grounds" that are "special" to this proceeding.[56] Finding that the Commission's stated reasons for adopting the consortium requirement failed to meet this standard, the *ARINC* Court vacated the consortium rule and remanded the issue to the Commission.[57]

26. *Tentative Decision*. In the *Tentative Decision*, the Commission, in addition to concluding that a consortium rule was reasonable, also concluded tentatively that compelling circumstances unique to the MSS licensing proceeding justified the adoption of a mandatory consortium.[58] Specifically, the Commission pointed out that active and immediate participation by an authorized licensee is imperative for the U.S. to secure necessary spectrum through the international frequency coordination process for a domestic mobile satellite system in the upper L-band. The Commission emphasized that the international negotiations were at a critical juncture, and explained that the delay caused by conducting time-consuming comparative hearings would severely weaken the U.S. negotiating position and disserve the public interest. The Commission tentatively concluded:

> A consortium approach is the *only* option at this time under which the United States can continue with international coordination. Failure to proceed in this way will, we believe, make it virtually impossible to secure sufficient spectrum with sufficient operational flexibility to support a U.S. domestic MSS system.[59]

27. *Comments*. Commenters opposed to the consortium rule argue that the Commission erred in tentatively concluding that there are compelling reasons unique to the MSS proceeding that justify a consortium requirement. As a procedural matter, these commenters argue that the Commission may not rely on post-appeal facts and circumstances concerning the current state of international spectrum negotiations to justify reimposition of the consortium requirement. This is so, they maintain, because the present situation regarding international coordination arises because of delay caused by the actions of the Commission,[60] or because section 402(h) of the Communications Act[61] purportedly requires the Commission to base its decision on remand on the record that existed in 1987.[62] In addition, these commenters allege that the compelling reasons cited in the *Tentative Decision* to justify the consortium were already considered and rejected by the *ARINC* Court.[63] Finally, these parties dispute the Commission's conclusion that the U.S. would be unable to coordinate the domestic MSS system internationally without the presence of an authorized MSS licensee.[64]

28. *Decision*. Initially, we disagree with Global and Globesat that section 402(h) of the Act limits our examination on remand strictly to the record as it existed in 1987 when the Commission adopted the consortium requirement. Section 402(h) provides that on remand the Commission, "unless otherwise directed by the court," must carry out the judgment of the court "upon the basis of the proceedings already had and the record upon which the appeal was heard and determined."[65] The *ARINC* Court directed the Commission on remand to reconsider the consortium rule and to conduct "further proceedings consistent with this opinion."[66] We believe this language enables the Commission to examine in this Rule Making proceeding any public interest considerations that are relevant to the specific issues remanded by the court. Such considerations clearly include the current status of the international coordination process and its relationship to and effect on the selection of an MSS licensee in a manner that will best serve the public interest. In response to the court's decision, the Commission conducted further proceedings and solicited comment from interested parties in an effort to develop fully the record concerning the remand issues, including whether the circumstances present in this proceeding support the consortium requirement in lieu of comparative hearings.[67] This procedure appears fully consistent with the *ARINC* Court's instructions and with judicial precedent concerning the scope of the record on remand under section 402(h).[68]

29. Moreover, ignoring clearly relevant public interest considerations would, in our view, be contrary to our obligations under the Communications Act. In considering how best to serve the public interest on remand, we must address real, practical problems that confront the U.S. today involving the international coordination process and the MSS proceeding. We cannot pretend that these problems do not exist. Therefore, we reject the contention that section 402(h) requires us to ignore the current state of the international frequency coordination process when determining which selection method will best serve the public interest in these circumstances.[69]

30. Similarly, we reject the claim that the Commission's actions somehow "caused" the current international threat facing the U.S. MSS system. As AMSC correctly notes,[70] our decision to adopt the consortium requirement did not cause the activity in the international coordination process by other countries seeking spectrum for mobile satellite purposes which makes prompt authorization of an MSS licensee imperative.[71] As we pointed out in the *Tentative Decision*, the international considerations that necessitated an expeditious MSS authorization process also existed in 1987 when we originally adopted the consortium requirement.[72] Indeed, had the Commission in 1987 sought to conduct comparative hearings to evaluate all 12 original MSS applicants, it almost certainly would not have been in a position to engage in coordination discussions as promptly as it did nor would it be as far along in the international process as it is today. The initial adoption of the consortium rule did not delay the Commission's participation in the process; the rule instead ensured and expedited U.S. participation.

31. Likewise, we reject ARINC/ATA's contention that the U.S. is experiencing difficulties in coordinating AMSC's system internationally because AMSC's system will provide a variety of land; maritime and aeronautical mobile services rather than aeronautical mobile satellite service ("AMSS") only. ARINC/ATA states that coordination of AMSC's system is inconsistent with the U.S. advance publication information, which identified the U.S. system as an AMSS system, and with the international allocation. The U.S. advance published an AMSS system in the upper L-band so that the U.S. proposal would fall

within the umbrella of the international allocation. The U.S. has nonetheless consistently pursued a generic allocation in the upper L-band as being a more efficient use of the orbit spectrum resource and has, indeed, proposed that a generic allocation be adopted at the upcoming World Administrative Radio Conference ("WARC"). While the upper L-band is allocated internationally to the aeronautical mobile satellite service (R) (10 MHz) and to the land mobile satellite service (4 MHz), we disagree with ARINC/ATA's contention that AMSC's system has caused undue coordination difficulties. All space and earth system parameters of AMSC's system fall within the parameters for the internationally allocated services and do not pose any additional interference threat or require any more protection. Coordination of the system is proceeding apace. Although it appears that the collective needs of the parties seeking to implement systems in the upper L-band may not be able to be fully accommodated in the available spectrum, we expect to be fully successful in procuring sufficient spectrum to support a domestic system. Coordination efforts would not be facilitated if AMSC were limited to providing AMSS services only, while the U.S. public would be deprived of needed land and maritime MSS voice services.

32. Commenters opposed to the consortium rule also incorrectly assert that the *ARINC* Court previously considered and rejected the reasons cited in the *Tentative Decision* which justify the consortium requirement. In the *Tentative Decision*, we acknowledged that our previous order adopting the consortium requirement focused on the undue delay inherent in comparative hearings and had not articulated the international considerations unique to the MSS proceeding which justify adoption of the consortium rule.[73] Those special considerations include the relationship of the international frequency coordination process to the MSS licensing proceeding and, more generally, the unique concern for undue delay in the satellite field. Thus, the *ARINC* Court did not have an opportunity to consider, much less reject, the compelling factors outlined in the *Tentative Decision*.

33. Finally, for reasons set forth in the *Tentative Decision*, we affirm that active and immediate participation of an authorized MSS licensee in the ongoing international coordination process is critical to our success in securing scarce spectrum for a domestic MSS system in the upper L-band. Global, however, asserts that the Commission could coordinate the MSS system with the assistance of a committee of the interested MSS applicants.[74] Global's assertion is impracticable and exhibits a fundamental misunderstanding of the international spectrum negotiation process. The Commission explained in the *Tentative Decision* why it is imperative that the U.S. participate in the ongoing coordination effort with a licensee that is implementing a real proposal backed up by firm business plans.[75] Without an actual licensee that can provide assurances to the other parties to the negotiation that the system will be built, these parties, which are currently building and coordinating their own upper L-band MSS systems, will be unlikely to make any operational concessions to accommodate a U.S. system. As a practical matter, moreover, we have no reason to believe that a "composite" system could be agreed to by these applicants during the pendancy and conduct of comparative proceedings. For example, at least one entity, Globesat, proposes a low-earth orbit ("LEO") satellite system that is flatly incompatible with the geostationary satellite system developed by AMSC.[76]

34. *Conclusion*. In sum, we affirm that compelling circumstances unique to this MSS licensing proceeding justify the adoption of the consortium requirement. The procedural challenges advanced by commenters opposed to the consortium rule are unavailing. Moreover, commenters have offered no persuasive substantive argument refuting our analysis of the compelling circumstances present in this proceeding which justify adoption of the consortium rule. Accordingly, we reinstate the requirement that MSS service shall be provided by a consortium of all willing and eligible applicants.[77]

### B. Criteria for Participation in the Consortium

35. The *ARINC* Court faulted the manner in which we required MSS applicants to demonstrate their financial qualifications by making a $5 million cash contribution into the consortium. The court vacated the cash contribution rule and reinstated the three applications that had been dismissed on this basis.[78]

36. *Tentative Decision*. In light of the *ARINC* Court's holding, the Commission proposed to modify the financial criteria for participation in the consortium by the three reinstated applicants. The Commission found that the fundamental goal of the financial eligibility standard had been met, *i.e.*, that AMSC has become a fully operational enterprise with sufficient financial resources to construct, launch and operate the MSS system. The Commission therefore proposed to eliminate the $5 million cash contribution requirement that was imposed on existing consortium members and to allow the three reinstated applicants to join the consortium in accordance with their ability and willingness to invest in the MSS venture.[79]

37. *Comments*. Some commenters opposed to the consortium rule maintain that it is unfair to force them to join the existing AMSC consortium under the terms proposed in the *Tentative Decision*. This is so, they argue, because the consortium has already made substantial business decisions and executed binding contractual arrangements without their participation. Thus, Global submits that the three reinstated applicants should be permitted to join the consortium under the terms and conditions in existence at the time their applications were dismissed.[80] MSSI asserts that if the Commission affirms the consortium rule, the consortium must be a newly formed entity.[81] For its part, AMSC states its willingness to accept the three reinstated applicants as participants in the consortium under the terms and conditions proposed in the *Tentative Decision*.[82]

38. *Decision*. We affirm the modified entry criteria proposed in the *Tentative Decision* under which the three reinstated applicants may seek to join the consortium absent any mandatory contribution requirement. Global, Globesat and MSSI will be afforded the opportunity to join the existing AMSC consortium in accordance with their willingness and ability to invest in AMSC. These modified entry criteria are consistent with the holding of the *ARINC* Court and provide the reinstated applicants an opportunity to participate in the consortium subject to the same rights and obligations that currently apply to existing consortium members.

39. Contrary to the claims of Global and MSSI, the Commission is not "forcing" the reinstated applicants to join the existing AMSC consortium. Rather, the Commission is affording these applicants an opportunity to join the consortium on terms which go beyond the holding of the *ARINC* Court and eliminate any mandatory financial contribution. Moreover, permitting these applicants to join AMSC is consistent with our determination that immediate and active participation by the consortium is essential to ensure the success of the U.S. in international frequency coordination efforts. The entry conditions advocated by Global and MSSI are impracticable and ill-advised. Dissolving the AMSC consortium at this late date and forming a new venture, or returning the consortium to its formation state (if this were even possible), would engender substantial delay, nullify the substantial progress achieved to date by the consortium and significantly weaken the U.S. negotiating position in the international coordination process.[83] In short, these proposals would advance the private interests of the reinstated applicants at the expense of the public interest. Any alleged unfairness to the reinstated applicants is outweighed by the overriding public interest in resolving this proceeding promptly to support U.S. efforts to secure scarce spectrum for a domestic MSS system. Accordingly, we will not alter the fundamental entry conditions: Global, Globesat and MSSI will be permitted to join the existing AMSC consortium with no mandatory financial contribution.

40. We are persuaded, however, by MSSI's argument that it would be unfair to require the reinstated applicants to join the consortium within 180 days of release of this *Final Decision*.[84] MSSI states that it will seek appellate review of any final Commission decision adopting a consortium rule in this proceeding. MSSI maintains that the six month participation timetable proposed in the *Tentative Decision* places opponents of the consortium requirement in a difficult position: they will be forced to invest in AMSC pending an appeal in order to preserve their rights to participate in the consortium, while concurrently challenging the consortium rule in court and thereby placing their investment in AMSC at risk. We find merit to this argument. We will adopt MSSI's suggestion to revise the timetable governing participation in the consortium to allow for an appeal of the Commission's final order in this proceeding. Accordingly, the 180 day timetable specified in the *Tentative Decision* will not begin until this *Final Decision* is no longer subject to judicial review.[85]

### C. Technical Considerations

41. Globesat and Motorola contend that, contrary to the Commission's discussion in the *Tentative Decision*, low-earth orbit satellite systems can be afforded international recognition and protection. They assert that international procedures already exist for recognition of these systems and that such systems may, because of their lower interference potential, be easier to coordinate than would systems in geostationary satellite orbit ("GSO"). They note that several LEO satellite systems have been advance published and notified by the implementing country and recorded in the Master International Frequency Register by the International Frequency Registration Board ("IFRB"). They therefore conclude that the Commission improperly rejected a LEO satellite system proposal in the upper L-band on the basis that it would not be feasible to coordinate such a system.[86]

42. We have carefully considered the benefits and drawbacks associated with implementing MSS through LEO satellite systems in the upper L-band. We agree that LEO systems may in the future offer many technical and other advantages.[87] Nevertheless, after careful analysis, we continue to believe that pursuing a LEO satellite system in the upper L-band as the source of domestic MSS service would have been a risky course of action in 1985, and, in any event, is not a practical option today. To require that MSS be provided through a LEO satellite system would entail a substantial risk that the U.S. MSS system would not be afforded full interference protection once it is launched.

43. The Commission initially addressed the issue of GSO versus LEO satellites[88] for provision of MSS when Globesat originally proposed a low-earth orbit satellite system. At the time, the Commission did not believe it feasible to consider attempting to coordinate a LEO satellite system in the upper L-band. Given the uncertainties that still exist for this sort of coordination and the interests at stake, we believe that a LEO satellite system in this band is still not practicable.

44. In light of the interest demonstrated by other countries in the upper L-band spectrum in the early-to-mid-1980's, the Commission and the National Telecommunications and Information Administration ("NTIA") agreed that it was imperative that the U.S. act quickly to protect its interest in these bands.[89] In 1985, no commercial LEO satellite systems had been launched or coordinated.[90] Because the interference considerations and other technical matters relating to LEO satellite systems differ significantly from those relating to geostationary satellite systems, the existing coordination procedures -- which apply only to geostationary satellites -- cannot be used. In 1985, the Commission had no reason to believe that a timely international agreement adopting procedures to govern coordination of LEO satellite systems could be reached or even that LEO satellite systems could be successfully coordinated in this portion of the spectrum given their operational characteristics. These uncertainties, and the need for the U.S. to proceed quickly and effectively to secure spectrum in the upper L-band, led us to conclude that a LEO satellite system was not a feasible option in 1985. Consequently, the U.S. advance published a geostationary MSS system.

45. The coordination difficulties associated with LEO satellites stem in part from the absence of specific coordination procedures for LEO systems in the International Telecommunication Union ("ITU") Radio Regulations. The coordination phase of the international registration process does not apply to LEO satellite systems. Only the advance publication and notification phases of the process apply. As a practical matter, however, a responsible country will not launch and operate a system if legitimate interference concerns have been raised by other countries after advance publication and have not been resolved. Absent coordination, consultation and negotiation with other affected countries, the system could not expect a full remedy if another duly notified system interferes with it. Moreover, interference objections to a proposed LEO system in the upper L-band would certainly arise as the system must be able to operate on a fully protected basis with continuous oper-

ations over its intended service area, in a frequency band to be shared with existing or planned GSO systems.[91] Thus, some type of coordination and operating agreement regarding a LEO satellite system's operations would be needed. Adopting the necessary procedures, however, will require an international consensus. Until that occurs, the U.S. cannot have adequate assurance that the operations of a LEO satellite system in the upper L-band potentially could be fully agreed to and protected by the affected countries currently implementing GSO systems.[92]

46. Moreover, potential interference difficulties cannot be remedied simply by "turning off" particular satellites as they pass over countries in which they are not authorized to operate, as Globesat states. We do not reject Globesat's contention that LEO satellites can be "turned off" for portions of its orbit. The global nature of these systems, however, raises international issues which have yet to be dealt with in the appropriate forum. LEO satellites typically transmit to the earth with circular or elliptical spot beams. It is not possible to shape these satellites' coverage areas to conform with each nation's boundaries.[93] Even assuming that LEO satellites could be turned on and off with extreme accuracy, and that their transmission beams could be reshaped as they pass over various borders, some spillover is inevitable.

47. As we pointed out in our *Tentative Decision*, coordination procedures for LEO satellite systems still have not been developed. In any event, while the U.S. is exploring the possibility of LEO satellite systems in other bands,[94] as a practical matter such an option is not available in the upper L- band. Domestically, the Commission has serious reservations that a LEO satellite system could satisfy the priority and preemption requirements for AMSS(R).[95] Moreover, internationally, changing the U.S. MSS systems to a LEO satellite system would result in the U.S. losing its priority status in the ITU coordination process.[96] This would mean that the U.S., as the "last in line," would bear the burden of coordinating its LEO satellite system with the geostationary satellite systems that have been advance published and that are currently being built and coordinated.[97] Thus, at this juncture, we conclude that coordination of proposed LEO satellite systems with operational geostationary satellite systems in the upper L-band is not feasible.

48. Thus, after consideration, we concluded that the Globesat LEO proposal for an MSS system in the upper L-band was risky in 1985 and conclude it is not feasible today. Globesat's proposal, while technically sound, raises significant problems if implemented in the upper L-band spectrum.[98] Until there is a full airing and resolution of the complex international issues associated with coordinating LEO satellite systems, we conclude that it would be inadvisable to pursue a LEO satellite system as the sole source for the U.S. domestic MSS system in the upper L-band. The U.S. public's need for satellite mobile voice services by a domestic provider must be met by a dependable MSS system protected from interference. For a number of reasons, achieving successful coordination of a LEO satellite system with the GSO systems currently being implemented in the upper L-band is highly unlikely. Therefore, on balance, we continue to believe our decision to coordinate a GSO satellite system in this band better serves the public interest.[99]

49. By this decision, the Commission is not prejudging the issue of LEO satellite service in other bands. To the contrary, the Commission is actively pursuing in other fora allocation proposals for LEO satellite service.[100] However, we cannot recommend a LEO satellite system in a band where entities have advance published their plans to implement geostationary satellite systems, and where the operational requirements of the various GSO systems will need to be tightly coordinated in order to facilitate sharing of the limited spectrum resource.

### D. Other Issues

#### 1. Ex Parte Communications

50. ARINC/ATA alleges that unlawful *ex parte* communications between AMSC and Commission personnel during the international coordination process taint both the MSS Rule Making and licensing proceedings.[101] We reject these arguments. The Commission fully considered and rejected these contentions in a previous order denying a Freedom of Information Act ("FOIA") request by ARINC's counsel, holding that the communications at issue did not violate the Commission's *ex parte* rules.[102] We determined that the disputed communications were not *ex parte* "presentations" under the Commission's rules because they were not directed to the merits or outcome of any restricted Commission proceeding, including the MSS licensing proceeding.[103] We also found that, even if the communications could be considered *ex parte* presentations with respect to the licensing proceeding, they were permissible as authorized by the Commission's rules[104] or came within the foreign affairs exception to the *ex parte* restrictions.[105] The conclusions set forth in our prior ruling apply with equal force to ARINC/ATA's similar argument in this proceeding.

#### 2. Notice and Comment Procedures

51. Several commenters argue that the Commission's actions in the international coordination process violate the Administrative Procedure Act ("APA"). ARINC/ATA, for example, contends that by conducting international negotiations based on AMSC's technical proposal, the Commission has unlawfully promulgated a technical MSS service rule without following applicable notice and comment requirements.[106] Similarly, Globesat asserts that our decision to withhold disclosure of materials concerning the international coordination process violates the notice and comment provisions of the APA.[107] We reject these arguments. Section 553(a)(1) of the APA provides that notice and comment requirements do not apply to a "foreign affairs function of the United States."[108] The Commission's efforts to coordinate a domestic MSS system through the international frequency coordination process are a foreign affairs function of the U.S. government and thus are not subject to notice and comment requirements.

#### 3. Needs of Aviation

52. ARINC/ATA contends that AMSC's system will not adequately serve the needs of the aviation industry. ARINC/ATA argues that counsel for AMSC stated "in substance," in an August 1991 CCIR study group meeting, that AMSC would not release any of its spectrum to international satellite systems such as INMARSAT to meet international AMSS(R) needs. ARINC/ATA states that this is further evidence of the prejudice that the coordination process has caused to other interested parties, and dem-

onstrates that the Commission must convene open proceedings to deal with core issues such as the needs of the aviation community.[109]

53. ARINC/ATA has not provided us with a transcript or with a verbatim account of what AMSC's counsel stated or the context in which it was said. Without this information, we cannot even begin to reply substantively to the alleged statement. However, we have no reason to believe that the needs of the Federal Aviation Administration ("FAA") are being prejudiced as AMSC builds its system. The domestic allocation for the upper L-band recognizes that AMSS(R) communications have priority and preemptive access throughout the band. Moreover, the Commission has strongly urged AMSC and the FAA to maintain a dialogue to address the FAA's concerns,[110] and this dialogue is ongoing. Because the upper L-band frequencies have been allocated domestically to both government and nongovernment use, NTIA also has been participating in the international coordination process on behalf of the FAA and other executive branch agencies. Further, the Commission is currently negotiating with INMARSAT in the coordination of the AMSC and INMARSAT MSS systems. The needs of the international aviation community should be well represented by INMARSAT, which will be carrying all of the international aviation traffic over ocean areas.[111] In any event, AMSC, like all other Commission-licensed satellite system operators, has received its authorization "subject to change by summary order of the Commission and [without] confer[ring] any permanent right to use the orbit and spectrum."[112] Should systems such as INMARSAT find that international AMSS(R) needs cannot be satisfied within the spectrum in which it is authorized to operate, the Commission would be able to consider the merits of that claim and initiate any necessary action at that time.

#### 4. Omninet's Application

54. In the *Tentative Decision*, the Commission denied a request by Omninet to reinstate its application, which Omninet had filed prior to the March 1985 cutoff date but subsequently had withdrawn in June 1987.[113] Omninet now asks the Commission to reverse this determination and reopen the MSS proceeding to accept its application. Omninet asserts that it did not voluntarily withdraw its application, as the Commission found in the *Tentative Decision*. Rather, Omninet maintains that the Commission "forced" Omninet to withdraw its application in 1987 by improperly imposing the cash deposit requirement.[114]

55. We are not persuaded by Omninet's argument. In our view, Omninet's decision to withdraw its application in 1987 was the product of its own free will presumably based on business considerations and judgment. Moreover, as we noted in the *Tentative Decision*, Omninet did not appeal the Commission's financial requirement or otherwise contest the rules and policies established for MSS in the *Second Report and Order*. Under these circumstances, we affirm our finding in the *Tentative Decision* that Omninet has no more right to enter the proceeding at this time than any other entity that is not currently a party. Therefore, we will not disturb our prior ruling denying Omninet's request. Omninet's application will not be reinstated.

### E. Affirmation of AMSC as Authorized Licensee

56. In light of the conclusions described above, we reaffirm our grant of the domestic MSS license to the American Mobile Satellite Corporation consortium. AMSC is hereby authorized to construct, launch and operate an MSS system in the upper L-band frequencies subject to the terms, conditions and specifications of the applications on file with the Commission, as amended, and as modified by prior Commission orders in this proceeding and by this *Final Decision*. This authorization is conditioned on compliance with this *Final Decision*.

57. Our grant of final authorization to AMSC herein supersedes the temporary authorization we conferred upon AMSC in the *Tentative Decision*. [115] Therefore, we dismiss as moot petitions for reconsideration filed by Globesat and MSSI, and a motion for stay filed by Globesat, concerning the grant of temporary authorization to AMSC in the *Tentative Decision*. [116] Consistent with our pledge in the *Tentative Decision*, [117] we have acted expeditiously to complete this proceeding and resolve the remand issues in an effort to minimize any possible prejudice to the applicants. Our dismissal of the petitions for reconsideration and motion for stay concerning the temporary authorization does not prejudice the right of parties to seek judicial review of this *Final Decision* affirming AMSC as the authorized licensee for a domestic MSS system.

## IV. CONCLUSION

58. We find that we have statutory authority to adopt a consortium licensing rule in lieu of holding comparative hearings in appropriate circumstances pursuant to our broad Rule Making authority under the public interest standard embodied in the Communications Act. We further find that adoption of a consortium licensing requirement in this instance is reasonable and fully justified by compelling circumstances involving the international frequency coordination process which are unique to the MSS licensing proceeding. We modify the participation criteria to permit Global, Globesat and MSSI to join the existing AMSC consortium without making a mandatory financial contribution. Finally, we affirm AMSC as the authorized licensee to construct, launch and operate a mobile satellite system in the upper L-band.

## V. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED that the tentative conclusions set forth in the *Tentative Decision* in this proceeding concerning the issues remanded by the court of appeals ARE AFFIRMED as indicated above.

60. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that the consortium requirement vacated by the court of appeals IS REINSTATED as indicated above. The consortium requirement shall be effective immediately upon publication in the Federal Register.[118]

61. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that American Mobile Satellite Corporation IS AFFIRMED as the authorized licensee to construct, launch and operate an MSS system in the upper L-band frequencies, subject to the terms, conditions and specifications set forth in the ap-

plications, as amended, and as modified by prior Commission orders in this proceeding and by this *Final Decision*. This authorization shall be effective immediately upon publication in the Federal Register.

62. IT IS FURTHER ORDERED that Global Land Mobile Satellite, Inc., Globesat Express, and Mobile Satellite Service, Inc., MAY PARTICIPATE in the licensed consortium subject to the terms and conditions specified in the *Tentative Decision* and this *Final Decision*. Failure by the above-referenced applicants to satisfy the specified terms and conditions for participation in the consortium will result in the dismissal of their applications for noncompliance with the Commission's rules and policies.

63. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Globesat Express and Mobile Satellite Service, Inc. on September 3, 1991, and September 4, 1991, respectively, concerning the grant of temporary authorization to American Mobile Satellite Corporation ARE DISMISSED as moot.

64. IT IS FURTHER ORDERED that the Motion for Stay filed by Globesat Express on September 20, 1991, concerning the grant of temporary authorization to American Mobile Satellite Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX

### PLEADINGS FILED IN RESPONSE TO TENTATIVE DECISION

**Comments (September 4, 1991):**

1. Aeronautical Radio, Inc., and the Air Transport Association of America ("ARINC/ATA")
2. American Mobile Satellite Corporation ("AMSC")
3. Global Land Mobile Satellite, Inc. ("Global")
4. Globesat Express ("Globesat")
5. Mobile Satellite Service, Inc. ("MSSI")
6. Motorola Satellite Communications, Inc. ("Motorola")
7. Omninet Corporation ("Omninet")
8. TRW Inc. ("TRW")

**Reply Comments (September 23, 1991):**

1. ARINC/ATA
2. AMSC
3. Global
4. Globesat
5. MSSI

**Petitions for Reconsideration**

1. Globesat (September 3, 1991)
2. MSSI (September 4, 1991)

**Opposition to Petitions for Reconsideration**

1. AMSC (September 23, 1991)

**Motion for Stay**

1. Globesat (September 20, 1991)

**Opposition to Motion for Stay**

1. AMSC (October 3, 1991)

### FOOTNOTES

[1] *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991) ("*ARINC*"). The specific frequencies involved in this proceeding are the 1545-1559 MHz and 1646.5-1660.5 MHz bands.

[2] *See Tentative Decision*, 6 FCC Rcd 4900 (1991). A listing of parties filing comments and other pleadings in response to the *Tentative Decision* is attached to this *Final Decision* as an Appendix. The abbreviations for the parties as indicated in the Appendix are used throughout this *Final Decision*.

[3] For a more detailed discussion of the procedural history of this proceeding, *see Tentative Decision*, 6 FCC Rcd at 4901, paras. 2-7.

[4] *Report and Order*, 2 FCC Rcd 1825 (1986), *recon. denied*, 2 FCC Rcd 6830 (1987), *further recon. denied*, 4 FCC Rcd 6016 (1989).

[5] *Second Report and Order*, 2 FCC Rcd 485 (1987) ("*Second Report and Order*"), *recon. denied*, 4 FCC Rcd 6029 (1989).

[6] *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 6041 (1989) ("*AMSC Authorization Order*").

[7] *Memorandum Opinion and Order*, 4 FCC Rcd 6029 (1989), *affirming Order*, 2 FCC Rcd 5552 (Com.Car.Bur. 1987).

[8] *See ARINC, supra*, 928 F.2d at 428. Aeronautical Radio, Inc. ("ARINC") also sought appellate review of the Commission's allocation decision, *see* n.4, *supra*, and its decision to dismiss ARINC's nonconforming application, which had been filed after the established cutoff date. *See Order*, 2 FCC Rcd 5990 (1987), *recon. denied*, 4 FCC Rcd 6067 (1989). The *ARINC* Court upheld both the allocation decision and the ARINC dismissal. *ARINC*, 928 F.2d at 438-445. The court later denied ARINC's suggestion of rehearing.

[9] *ARINC*, 928 F.2d at 446-48.

[10] *Id.*, 928 F.2d at 450-53.

[11] *Id.*, 928 F.2d at 448, 453.

[12] *Public Notice*, 6 FCC Rcd 2087 (1991).

[13] 6 FCC Rcd at 4002-6, paras. 12-32.

[14] 47 U.S.C. § 309(e).

[15] *Tentative Decision*, 6 FCC Rcd at 4902-3, paras. 12-15.

[16] 326 U.S. 327 (1945).

[17] 351 U.S. 192 (1956).

[18] *Tentative Decision*, 6 FCC Rcd at 4903-4, paras. 16-18.

[19] *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. Pottsville Broadcasting*, 309 U.S. 134 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

[20] *Tentative Decision*, 6 FCC Rcd at 4904-6, paras. 19-27.

[21] *See United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*).

[22] *See, e.g., Comsat Corporation*, 40 FCC 2d 496 (1973) (Commission required Comsat and three maritime carriers to form joint venture for provision of MARISAT maritime satellite system); *Final Decision and Policy Statement*, 49 Fed. Reg. 9727 (March 15, 1984) (Commission required competing applicants to form joint venture to provide common carrier satellite earth station facilities in the Alaskan bush communities); *Report and Order, Establishment of Domestic Communications-Satellite Facilities by Nongovernmental Entities, Appendix C -- Memorandum on Legal Issues*, 22 FCC 2d 86, 130 (1970) (Commission indicated that it was empowered to require joint-ownership arrangements in appropriate circumstances).

[23] *See* ARINC/ATA Comments at 7-10; Global Comments at 1-7; Globesat Comments at 4-11; MSSI Comments at 3-10.

[24] AMSC Comments at 7-14.

[25] *E.g.*, MSSI Comments at 4-5.

[26] ARINC/ATA Comments at 10; Global Comments at 3; Globesat Comments at 7; MSSI Comments at 6-7.

[27] Global Comments at 2-3.

[28] ARINC/ATA Comments at 12-13; Global Comments at 5; Globesat Comments at 10; MSSI Comments at 8-9.

[29] Global Comments at 6; Globesat Comments at 7; MSSI Comments at 8 n.3, 10.

[30] *See ARINC*, 928 F.2d at 452. The *ARINC* Court also stated that the comparative hearing process is "unquestionably the standard method for the Commission to resolve mutually exclusive applications." *Id.*, 928 F.2d at 450. In fact, however, the Commission's use of comparative hearings for initial licensing proceedings is now more the exception than the rule. Generally, comparative hearings are used primarily for full service broadcast stations. The Commission uses lotteries for initial licensing in the vast majority of other services in which mutually exclusive situations are a regular occurrence.

[31] *La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233, 1235 (D.C. Cir. 1990), *citing Ashbacker*, 326 U.S. at 333. *See Tentative Decision*, 6 FCC Rcd at 4902, para. 13 & n.29.

[32] *See Rainbow Broadcasting Co. v. FCC*, No. 90-1591, slip op. at 8 (D.C. Cir. Nov. 8, 1991).

[33] AMSC Reply Comments at 7.

[34] *Storer*, 351 U.S. at 202.

[35] *See ARINC*, 928 F.2d at 439 (Supreme Court has recognized that right to Section 309(e) hearing is not absolute; Commission may reject, without a hearing, applications which do not meet valid eligibility requirements). *Accord, Rainbow Broadcasting, supra* n.32, slip op. at 11 ("Congress delegated to the FCC the authority to deny the eligibility of applicants for television licenses [without a hearing] where such denial serves the public interest . . . .").

[36] We disagree with those commenters who contend that our adoption of the consortium requirement went beyond the holding of *Storer* and effectively established the licensee by rule. *See* para. 13, *supra*. As we noted in the *Tentative Decision*, the Commission did not award the MSS license to any party in the context of the MSS Rule Making. Rather, the Commission granted the MSS license in a separate authorization proceeding, conducted pursuant to Section 309 of the Act, after establishing the consortium requirement. *See Tentative Decision*, 6 FCC Rcd at ( 4903, n.31.

[37] *See id.*

[38] *See id.*, 6 FCC Rcd at 4903, para. 14.

[39] Global Comments at 2.

[40] In addition, Global and other applicants have at all times been free to petition the Commission to waive the consortium rule for good cause shown. 47 C.F.R. § 1.3 (1990). A demonstration that an individual application is technically superior to the proposed system submitted by the consortium and would otherwise better serve the public interest would support a waiver of the consortium requirement. As discussed in the *Tentative Decision*, however, Global, Globesat and MSSI have failed in the Rule Making proceeding as well as on remand to demonstrate that their applications are technically superior to the proposed system submitted by the consortium. *See Tentative Decision*, 6 FCC Rcd at 4911-12, paras. 54-60. *See also* Section III.C, *infra*. Nor have these three applicants offered any other persuasive showing that special circumstances unique to their applications warrant a deviation from the consortium rule and that such deviation will serve the public interest. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Therefore, we find no reason to conclude that application of the consortium requirement will disserve the public interest in these circumstances. *Cf. Storer*, 351 U.S. at 204-5.

[41] *Tentative Decision*, 6 FCC Rcd at 4903, para. 18.

[42] As we noted in the *Tentative Decision*, the Commission has required a joint venture in a mutually exclusive common carrier application context. *Tentative Decision*, 6 FCC Rcd at 4905, para. 22 & n.51 (citing *Final Decision and Policy Statement*, 49 Fed. Reg. 9727 (March 15, 1984) (common carrier satellite earth station facilities in Alaskan bush communities)).

[43] *Tentative Decision*, 6 FCC Rcd at 4905, n.47.

[44] *Cf. Rainbow Broadcasting*, slip op. at 8 (Even where Commission has expressed its view that public interest is best served by open competition for frequencies allotted to a community, Commission may permissibly determine, with reasoned explanation, that its open competition policy should no longer apply to new frequencies allotted in context of channel exchanges).

[45] 47 U.S.C. § 309(i).

[46] *See Second Report and Order*, 2 FCC Rcd at 487, para. 16.

[47] *Tentative Decision*, 6 FCC Rcd at 4905, nn. 56, 57.

[48] *Id.*, 6 FCC Rcd at 4905, para. 26 & n.55 (citing H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 41, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2261, 2285). A lottery, for example, would speed the authorization process, one of the guiding public interest factors mentioned in the legislative history to the lottery statute favoring random selection, and a critical concern in the MSS proceeding. *See* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2261, 2281. *See also Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1362 (D.C. Cir. 1988) (factors cited in legislative history of lottery statute do not rise to level of binding statutory requirements).

[49] *See* MSSI Comments at 9, 12-14. MSSI further suggests that the Commission could ensure the financial viability of the MSS licensee (a principal objective of the consortium rule) by requiring the winning lottery applicant to allow others to participate in some type of joint venture. MSSI would establish the licensee purely by random selection and would then require the licensee to restructure its ownership plan to become a consortium of applicants. This proposal, while it might further some private interests, in our view offers no public benefits beyond those already achieved by the consortium rule. Likewise, we see no benefit at this juncture, as the *ARINC* Court suggests, in conducting formal hearings to determine if any one individual application might be technically superior to the other applications, and subsequently permitting or requiring the winning applicant to form a consortium with the other applicants. *See*

*ARINC*, 928 F.2d at 452. After carefully examining the diverse technical proposals and comments of numerous applicants in the Rule Making proceeding, we have already determined what technical requirements are in the public interest for the MSS system.

[50] *See Tentative Decision*, 6 FCC Rcd at 4905, n.57.

[51] Instituting a lottery and determining the qualifications of the selectee would involve significant delays which would seriously impair the ability of the United States to negotiate effectively in the ongoing international coordination process (*see* Section III.A.2, *infra*). A lottery, moreover, offers no public interest benefits not already obtained by the consortium rule. A comparative proceeding, of course, would be even more harmful to U.S. interests than a lottery. This is so because the time required to conduct lengthy comparative hearings in all probability would negate U.S. efforts in international spectrum negotiations and would likely destroy the prospects for development of a domestic MSS system in the upper L-band.

[52] *See Tentative Decision*, 6 FCC Rcd at 4905, para. 25. In this regard, AMSC states that the 1982 lottery amendments represent "an unambiguous determination that comparative hearings are not justified in all cases" and that the right to a comparative hearing is "not absolute". AMSC Reply Comments at 12.

[53] *Tentative Decision*, 6 FCC Rcd at 4905, para. 25.

[54] *See id.*, 6 FCC Rcd at 4905, n.57.

[55] For reasons discussed at paras. 15-17, *supra*, we reject Globesat's contention that Congress' enactment of the lottery provision demonstrates that the Commission may not deny an applicant a comparative hearing without explicit authority granted by the legislature. *See* Globesat Comments at 11.

[56] *ARINC*, 928 F.2d at 452.

[57] *Id.* In announcing the new standard by which it would evaluate Commission decisions to employ other selection methods in lieu of comparative hearings, the *ARINC* Court relied on the "strong presumption" in favor of such hearings it perceived in the statute and the case law. *Id.* AMSC observes that Congress' adoption of Section 309(i) of the Act providing for lotteries eliminates the need for the Commission to have a "compelling reason" for departing from comparative hearings. AMSC Reply Comments at 12. As explained in the *Tentative Decision*, we believe we may adopt a consortium rule in this proceeding pursuant to our Rule Making authority under the broad public interest standard so long as our view "is based on consideration of permissible factors and is otherwise reasonable." *Tentative Decision*, 6 FCC Rcd at 4906, para. 28 (citing *FCC v. WNCN Listeners Guild*, 450 U.S. at 594). In any event, we believe that the reasons justifying the consortium requirement in this proceeding are both reasonable and compelling and thus satisfy the standard enunciated by the *ARINC* Court.

[58] *Tentative Decision*, 6 FCC Rcd at 4906-11, paras. 33-53.

[59] *Id.*, 6 FCC Rcd at 4911, para. 53 (emphasis in original).

[60] ARINC/ATA Comments at 5-6; Globesat Comments at 13-14.

[61] 47 U.S.C. § 402(h).

[62] Global Comments at 8; Globesat Comments at 14-15.

[63] ARINC/ATA Comments at 10-12; MSSI Comments at 9.

[64] Global Comments at 9; Globesat Comments at 23.

[65] 47 U.S.C. § 402(h).

[66] *ARINC*, 928 F.2d at 453.

[67] In this regard, as AMSC notes, interested parties have been afforded a full and equal opportunity on remand to submit, and have in fact submitted, new information concerning the reconsideration of the consortium rule and relevant public interest factors. *See* AMSC Reply Comments at 28. Any new information which became a part of the record on remand has been subject to public scrutiny through submission of comments and reply comments in this proceeding.

[68] *See, e.g., Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95, 101 & n.8 (D.C. Cir. 1985) (Commission free to apply any reasonable interpretation of Section 402(h) to post-remand proceedings; usual judicial practice is to allow agency to determine whether post-remand filings are necessary to comply with court's mandate).

[69] Indeed, the inflexible interpretation of Section 402(h) advanced by Global and Globesat could easily lead to absurd results which would disserve the public interest.

[70] AMSC Reply Comments at 24.

[71] In any event, even if our prior adoption of the consortium rule could be viewed as related to the current international threat facing the U.S. MSS system, we disagree with those commenters who contend that we would be precluded from considering that threat. These parties offer no legal authority for such a proposition. Our task in this Rule Making proceeding is to determine which policies and rules will best ensure a domestic MSS system. In order to achieve that goal, we must take into account all relevant public interest considerations as they exist today. Therefore, it is necessary and appropriate that we consider the current state of the international coordination process in deciding how to proceed on remand.

[72] *Tentative Decision*, 6 FCC Rcd at 4907, para. 35. As we observed in the *Tentative Decision*, those considerations have become more significant today in light of the advanced state of international spectrum negotiations. *Id.* However, it was clear in 1987 that the U.S. must act quickly to secure scarce spectrum in the upper L-band for a domestic MSS system through the international coordination process. It was also apparent that the U.S. negotiating posture would be significantly enhanced by the presence of an authorized U.S. MSS licensee in negotiations with other countries. Thus, in 1987, there was an obvious need to expedite the authorization of the MSS licensee. We therefore believe the circumstances present in 1987 would have supported the adoption of the consortium rule as the best available means to achieve a domestic MSS system in the upper L-band.

[73] *Tentative Decision*, 6 FCC Rcd at 4907, para. 35 & n.66.

[74] Global also maintains that the Commission must seek to coordinate all applicants' proposals, or some composite of them agreed to by all applicants. Global Comments at 9.

[75] *See Tentative Decision*, 6 FCC Rcd at 4908, 4910, paras. 42, 48-52.

[76] *See* Section III.C, *infra*.

[77] TRW, which has an application pending in a separate satellite licensing proceeding involving the RDSS bands, urges the Commission to clarify that the reasons which justify reimposition of the consortium rule in this proceeding do not apply to other multiple applicant satellite proceedings. TRW Comments at 5-9. Our decision to adopt the consortium rule herein is based on factors unique to the MSS licensing proceeding, which are present in the record before us. Our holding in this *Final Decision* relates to the MSS licensing proceeding and does not address circumstances present in other pending Commission licensing proceedings.

[78] *ARINC*, 928 F.2d at 446-8. We note that while the *ARINC* Court faulted the *cash-only* requirement of the Commission's financial qualification rule, it expressly did not pass on the validity of requiring a financial contribution as a threshold eligibility criterion. *Id.*, 928 F.2d at 448, 449 n.59.

[79] *Tentative Decision*, 6 FCC Rcd at 4912, paras. 61-65.

[80] Global Comments at 11-12; Global Reply Comments at 3-5.

[81] MSSI Comments at 10-11; MSSI Reply Comments at 4-6.

[82] AMSC Comments at 3-4; AMSC Reply Comments at 34-37. AMSC urges the Commission, however, to shorten by half the six month timetable proposed in the *Tentative Decision* for participation by the reinstated applicants in order to resolve the MSS proceeding as soon as possible.

[83] Further, AMSC and Telesat Canada have agreed to procure identical systems so that immediate back-up capacity can be provided to the other, if necessary. Nullification of this agreement could significantly affect the close U.S.--Canadian cooperation necessary to coordinate MSS systems in the North/South American region.

[84] MSSI Reply Comments at 4-5.

[85] To the extent that the reinstated applicants seek to join AMSC before the termination of their litigation regarding this decision, the Commission will examine the conditions and parameters of their participation on a case-by-case basis.

[86] Globesat Comments at 16-20; Motorola Comments at 3-8.

[87] *See Report*, 6 FCC Rcd 3900, 3906-8, paras. 43-57 (1991) (LEO proposals for WARC-92).

[88] Geostationary satellites revolve around the Earth over the plane of the equator at the same rate as the Earth rotates and therefore appear stationary from any given location on Earth. In contrast, LEO satellites orbit the Earth at lower altitudes and in various orbital planes. Consequently, LEO satellites do not appear stationary from a fixed point on the Earth and, in fact, pass over all countries in the plane of their orbits. Up to one or two dozen LEO satellites are needed if continuous coverage of a service area is to be provided. To provide continuous coverage, a new satellite must come into view from the particular service area as the first one disappears over the horizen.

[89] *See Tentative Decision*, 6 FCC Rcd at 4909, para. 45.

[90] The National Oceanic and Atmospheric Administration ("NOAA") and NASA had launched several low-earth orbit meteorological and scientific satellites. These satellites, however, are only required to be advance published and notified. No coordination is required with other satellite systems.

[91] *See, e.g., Telesat Canada Feasibility Study of Spectrum Sharing between LEO/MSS and GSO/MSS and Fixed Services and FPLMTS (Final Report)* (April 25, 1991). GSO satellite systems generally operate with significantly higher powers than do LEO satellite systems. In the *Tentative Decision*, the Commission referred to the Telesat Canada study, which indicates that GSO system transmissions are 2,000 to 500,000 times stronger than are transmissions from a LEO satellite system. The Telesat Canada study therefore concludes that co-channel interference from GSO satellite system mobile earth terminals to LEO satellite systems is insurmountable.

Although we expressly cited to and fully identified this study in the *Tentative Decision* (6 FCC Rcd at 4912, para. 59, n.95), Globesat Express alleges that the Commission afforded inadequate notice and opportunity to comment on the study. In this regard, we note that the study in question was not an internal FCC report consisting of data known only to the Commission. The Telesat Canada study is widely available, and the Commission, therefore, simply took official notice of its existence and conclusions when seeking comment on the *Tentative Decision*. Indeed, the two parties who commented on the study, Motorola and Globesat, indicated through their comments that they have had full access to the study's contents. (Globesat, for example, mentions facts about the study that were not revealed in the *Tentative Decision.)* In these circumstances, we believe the parties had full notice and opportunity to comment on the study, and certainly any commenter who desired a copy of the document could have readily obtained it from the Commission. In any event, the study is not the central basis for our conclusions regarding LEO satellite systems but is merely additional evidence of one factor that we have considered.

[92] None of the examples of LEO satellite systems cited by Motorola or Globesat is comparable to the circumstances presented by use of LEO satellites for an MSS system in the upper L-band. The Space Shuttle and Glonass (with respect to certain frequencies) were subject to the supplementary coordination procedures contained in Article 14 of the ITU Radio Regulations by virtue of a footnote in the allocation table. COSPAS is an emergency communications system and has absolute priority over all other transmissions in the band pursuant to Article 39. Molnia operates on a secondary, non-interference basis to GSO fixed-satellite service systems in accordance with Radio Regulation 2613, the NOAA satellites operate on an intermittent basis only, and Navstar and Glonass (with respect to the remaining frequencies) were implemented in bands in which no other satellite systems were then being planned.

[93] For example, a typical LEO system could not provide service to the entire continental United States without illuminating some portions of Canada, Mexico, the Carribean and Central America. This "spillover" would be increased if domestic coverage included Alaska, Hawaii, and Puerto Rico/Virgin Islands. While transmission beams from GSO systems also may cover portions of neighboring countries, coordination procedures are in place to resolve interference issues. No similar procedures are in place for LEO systems.

[94] *See An Inquiry Relating to Preparation for the International Telecommunication Union World Adminstrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Sprectrum, Report*, 6 FCC Rcd 4900 (1991); *Second Notice of Inquiry*, 5 FCC Rcd 6046 (1990); *Supplemental Notice of Inquiry*, 6 FCC Rcd 1914 (1991).

[95] The U.S. allocation scheme for the upper L-band provides that AMSS(R) shall have priority access with real-time preemptive capability in the whole band. *See* 47 C.F.R. § 2.106, footnote US309. For this reason, the Commission recently stated that it was "reluctant" to consider the LEO proposals for WARC-92 that had been filed by Motorola Satellite Corporation and Ellipsat Corporation in the 1646.5-1660.5 MHz. band. *See Supplemental Notice of Inquiry*, 6 FCC Rcd at 1917, paras. 22-23.

[96] Because the status that vested for coordination purposes was conferred on a geostationary satellite system, the U.S. would be deemed to have abandoned its previous MSS system and would be required to begin the coordination process anew. Globesat correctly notes this would provide the U.S. with an additional time period in which to complete coordinating the satellite system and bring it into use. Obtaining this additional time, however, is largely irrelevant if insufficient spectrum remains to accommodate the newly proposed system or if the system could not be successfully coordinated at all.

[97] During the time that the U.S. is attempting to select and coordinate a LEO satellite system through comparative hearings or another selection process, the other entities that are building systems will continue to develop and finalize coordination agreements for their upper L-band systems. Coordination will become more difficult as new countries submit proposals. For example, most recently Mexico announced its plans to implement a GSO satellite system in the upper L-band and advanced published its proposed system. Significantly, entities that have advanced published are under no obligation to accommodate fully a later U.S. LEO proposal and, indeed, may not be able to do so even if they attempt to make such accommodations. The likely result is that most, if not all, of the available spectrum

will be divided up in coordination discussions among the other counties and INMARSAT, thus leaving insufficient spectrum for a domestic U.S. system.

[98] Contrary to Globesat's assertions (*see* Globesat Reply Comments at 3), INMARSAT's announcement that it is considering a LEO satellite system as its fourth generation system does not have any implications regarding the likelihood of procuring full international recognition and protection for a LEO system in the upper L-band. In making its announcement, INMARSAT did not commit itself to a LEO design and, more significantly, did not mention the frequency bands on which it intends the system to operate. As noted, the U.S. is similarly pursuing the possibility of LEO satellite systems in a variety of frequency bands. Our decision not to pursue a LEO system in the upper L-band is based on the circumstances unique to the MSS licensing proceeding. The Commission retains flexibility to authorize LEO satellite systems to provide MSS in other frequency bands.

[99] As we stated in the *Tentative Decision*, coordination of a domestic GSO satellite system ordinarily does not require the involvement of countries on the other side of the Earth. Nevertheless, as Globesat notes, the Commission stated that Papua New Guinea and Australia will be involved in the coordination of a U.S. GSO mobile satellite system in the upper L-band. A transmission beam on the proposed Papua New Guinea upper L-band system directly covers Hawaii, triggering the need for a negotiated coordination agreement. The technical characteristics and beam patterns of the proposed Australian system have triggered the conservative coordination mechanism in Appendix 29 of the ITU Radio Regulations. As a practical matter, however, the interference potential between an Australian GSO mobile satellite system and a U.S. GSO mobile satellite system is minimal and specific problems, if any, should be readily resolved using existing procedures.

[100] *See* n.94, *supra*.

[101] ARINC/ATA Comments at 20-27; ARINC/ATA Reply Comments at 9.

[102] *Robert J. Butler*, FOIA Control No. 91-120, 6 FCC Rcd 5414, 5417-18, paras. 25-30 (1991).

[103] *See* 47 C.F.R. § 1.1202(a) (1990).

[104] *See* 47 C.F.R. §§ 1.1204(b)(1), 25.202(c) (1990).

[105] *See* 47 C.F.R. § 1.1204(b)(4) (1990).

[106] ARINC/ATA Comments at 13-17; ARINC/ATA Reply Comments at 6-7.

[107] *See* Globesat Comments at 24.

[108] 5 U.S.C. § 553(a)(1).

[109] ARINC/ATA Reply Comments at 8.

[110] *See AMSC Athorization Order*, 4 FCC Rcd at 6055.

[111] As a signatory to INMARSAT, it is incumbent on the U.S. to ensure that the needs of the international aviation community are met.

[112] *AMSC Authorization Order*, 4 FCC Rcd at 6060.

[113] *Tentative Decision*, 6 FCC Rcd at 4914, paras. 74-75.

[114] Omninet Comments at 2-3.

[115] In the *Tentative Decision*, we granted AMSC temporary authority pursuant to 47 U.S.C. § 309(f) to continue as the authorized U.S. MSS system pending release of this *Final Decision*. The grant of temporary authority was premised on the need for an authorized licensee to participate in critical international negotiations during the interim period. *Tentative Decision*, 6 FCC Rcd at 4915, paras. 78-80.

[116] Likewise, objections raised by other commenters to the temporary authorization are moot in light of our action herein.

[117] 6 FCC Rcd at 4915, para. 80.

[118] Due to the exigent circumstances noted above concerning the international frequency coordination process, we find good cause for making the consortium requirement effective immediately upon publication in the Federal Register. 5 U.S.C. § 553(d)(3). Immediate implementation of the consortium rule is necessary to grant final authorization to a domestic MSS licensee. As described above, the presence and participation of an authorized domestic MSS licensee during the ongoing international negotiations is critical to U.S. efforts to secure needed spectrum for a domestic MSS system. Unless the consortium requirement takes effect immediately, there will be no final, authorized MSS licensee to assist the Commission in the international frequency coordination process.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: January 9, 1992**

## FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

**Schaberg, David C.** - Request for waiver and refund of filing fees for a new FM station at Glen Arbor, Michigan - **Denied** (November 29, 1991).

**Southwestern Bell Telephone Company** - Request for a refund of filing fees paid for four petitions for waiver of the Part 69 tariff rules - **Granted** (December 26, 1991).

**Locke Supply Company** - Request for a refund of filing fees paid for four petitions for extensions of time to construct low power television stations - **Granted** (December 26, 1991).

**Lea County Broadcasting** - Request refund of filing fee for radio station license KLEA-FM, Lovington, New Mexico - **Granted** (December 26, 1991).

**Contel Corporation** - Request for refund of filing fee for petition for waiver of Part 69 of the rules - **Granted** (December 26, 1991).

**Rossi, Thomas J.** - Request for reinstatement of 18 applications for 220 MHz trunked systems - **Granted** (December 30, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. William A. Blase, Jr.
Southwestern Bell Telephone Company
Director-Federal Regulatory
1667 K Street, N.W.
Suite 1000
Washington, D.C. 20006

Dear Mr. Blase:

This is in response to the request made by Southwestern Bell Telephone Company (Southwestern) for a refund of the fee payments that Southwestern made in connection with its filing of four petitions for waiver of the Part 69 tariff rules.

You state that a refund is due because the Commission has clarified that no fee requirement applies to petitions for waiver of the Part 69 tariff rules.

Our review of this matter demonstrates that a refund is warranted. In its recent reconsideration of its FEES II decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC 5919, 5923 (1991). More specifically, the Commission decided that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of the rules. Id.

Accordingly, your request is granted. A check, drawn in the amount of $18,640.00 and made payable to Southwestern Bell Telephone Company, representing a refund for fee payments covering four petitions for waiver of the Part 69 tariff rules, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Robert L. Olender, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Olender:

This is in response to your request for a refund of the fee payments submitted by Locke Supply Co. to cover four petitions for extensions of time to construct low power television stations.

Our review of this matter discloses that no fee is required under the Fee Schedule to cover petitions for extension of time to construct low power television stations. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3601 (1990). Accordingly, your request is granted.

A check, drawn in the amount of $800.00 and made payable to Locke Supply Co., will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Bodorff:

This is in response to your "Fee Refund Request" submitted on behalf of Lea County Broadcasting (Lea County), licensee of KLEA-FM, Lovington, New Mexico.

You state that Lea County tendered a $1,565 rulemaking fee upon filing a petition for rulemaking to amend the FM Table of Allotments. You further state that the FCC fee filing instruction form provides that this fee is not due until an applicant files to effectuate the rulemaking proposal subsequent to the Commission's authorization of the changes proposed. You now request refund of Lea County's $1,565 rulemaking fee pursuant to Section 1.1111(a)(1) of the Commission's Rules, as you contend this fee was prematurely filed.

Section 1.1111(a)(1) of the Commission's Rules provides for refund of a fee when no fee is required for the application or the filing. 47 C.F.R. § 1.1111(a)(1). Although Lea County's petition for rulemaking requires a $1,565 fee (see 47 C.F.R. § 1.1104), this fee is not payable at the time of filing the petition. Rather, the rulemaking fee is payable at the time of filing the application for change. See "Mass Media Services Fee Filing Guide" n. 12. Because the fee for Lea County's petition for rulemaking is not due until Lea County files its application for change (in addition to the fee for the minor change), your "Fee Refund Request" will be granted.

Accordingly, a check for $1,565, payable to Lea County Broadcasting, will be forwarded you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Mr. Mark L. Billings
Director-Tariffs
GTE Telephone Operations
600 Hidden Ridge, HQE01F04
P.O. Box 152092
Irving, Texas 75015-2092

Dear Mr. Billings:

This is in response to your request for a refund of the fee payment submitted by Contel Corporation (Contel), shortly before its merger with GTE Corporation, in connection with its filing of a petition for waiver of Part 69 of the rules requesting permission to establish a new access tariff rate element related to Operator Services.

You state that a refund is due because Section 1.1105 is unclear as to whether the filing of petitions for waiver of the Part 69 tariff rules is subject to a fee requirement.

In its recent reconsideration of its FEES II decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, (1990), reconsidered in part, 6 FCC Rcd 5919, 5923 (1991). More specifically, the Commission clarified that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of its rules. Id.

Accordingly, your request for a refund is granted. As you have requested, a check, drawn in the amount of $4,660.00 and made payable to GTE Telephone Operations, will sent to you at the above address at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 30 1991

Gerald S. McGowan, Esquire
Lukas, McGowan, Nace
& Gutierrez
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006

Dear Mr. McGowan:

This is in response to your request for reinstatement, nunc pro tunc, of 18 applications for 220 MHz trunked systems filed by Mr. Thomas J. Rossi.

You state that Mr. Rossi timely filed his applications and the requisite fees, but the applications were returned because his fee payment checks were dishonored. The checks were drawn on the Madison National Bank (Bank), but subsequent to Mr. Rossi's submission of the checks to the Commission, the Federal Deposit Insurance Corporation (FDIC) assumed control of that Bank. The FDIC froze Mr. Rossi's account when he was erroneously identified as a delinquent borrower of the Bank's and, as a consequence, the FDIC dishonored his fee payment checks. See letter by John W. Hyche, Account Officer, Federal Deposit Insurance Corporation to Thomas J. Rossi, dated October 11, 1991.

Our review of this matter discloses that Mr. Rossi's fee checks were dishonored due to bank error. In such cases, where the payment of a fee is dishonered because of bank error, as evidenced by a letter from an appropriate bank official, the Commission will reinstate the associated applications, nunc pro tunc. See 47 C.F.R. § 1.1114(a)(2).

Accordingly, your request is granted.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 30 1991

Gerald S. McGowan, Esquire
Lukas, McGowan, Nace
& Gutierrez
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006

Dear Mr. McGowan:

This is in response to your request for reinstatement, nunc pro tunc, of 18 applications for 220 MHz trunked systems filed by Mr. Thomas J. Rossi.

You state that Mr. Rossi timely filed his applications and the requisite fees, but the applications were returned because his fee payment checks were dishonored. The checks were drawn on the Madison National Bank (Bank), but subsequent to Mr. Rossi's submission of the checks to the Commission, the Federal Deposit Insurance Corporation (FDIC) assumed control of that Bank. The FDIC froze Mr. Rossi's account when he was erroneously identified as a delinquent borrower of the Bank's and, as a consequence, the FDIC dishonored his fee payment checks. See letter by John W. Hyche, Account Officer, Federal Deposit Insurance Corporation to Thomas J. Rossi, dated October 11, 1991.

Our review of this matter discloses that Mr. Rossi's fee checks were dishonored due to bank error. In such cases, where the payment of a fee is dishonered because of bank error, as evidenced by a letter from an appropriate bank official, the Commission will reinstate the associated applications, nunc pro tunc. See 47 C.F.R. § 1.1114(a)(2).

Accordingly, your request is granted.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. William A. Blase, Jr.
Southwestern Bell Telephone Company
Director-Federal Regulatory
1667 K Street, N.W.
Suite 1000
Washington, D.C. 20006

Dear Mr. Blase:

This is in response to the request made by Southwestern Bell Telephone Company (Southwestern) for a refund of the fee payments that Southwestern made in connection with its filing of four petitions for waiver of the Part 69 tariff rules.

You state that a refund is due because the Commission has clarified that no fee requirement applies to petitions for waiver of the Part 69 tariff rules.

Our review of this matter demonstrates that a refund is warranted. In its recent reconsideration of its FEES II decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC 5919, 5923 (1991). More specifically, the Commission decided that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of the rules. Id.

Accordingly, your request is granted. A check, drawn in the amount of $18,640.00 and made payable to Southwestern Bell Telephone Company, representing a refund for fee payments covering four petitions for waiver of the Part 69 tariff rules, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Robert L. Olender, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Olender:

This is in response to your request for a refund of the fee payments submitted by Locke Supply Co. to cover four petitions for extensions of time to construct low power television stations.

Our review of this matter discloses that no fee is required under the Fee Schedule to cover petitions for extension of time to construct low power television stations. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3601 (1990). Accordingly, your request is granted.

A check, drawn in the amount of $800.00 and made payable to Locke Supply Co., will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Bodorff:

This is in response to your "Fee Refund Request" submitted on behalf of Lea County Broadcasting (Lea County), licensee of KLEA-FM, Lovington, New Mexico.

You state that Lea County tendered a $1,565 rulemaking fee upon filing a petition for rulemaking to amend the FM Table of Allotments. You further state that the FCC fee filing instruction form provides that this fee is not due until an applicant files to effectuate the rulemaking proposal subsequent to the Commission's authorization of the changes proposed. You now request refund of Lea County's $1,565 rulemaking fee pursuant to Section 1.1111(a)(1) of the Commission's Rules, as you contend this fee was prematurely filed.

Section 1.1111(a)(1) of the Commission's Rules provides for refund of a fee when no fee is required for the application or the filing. 47 C.F.R. § 1.1111(a)(1). Although Lea County's petition for rulemaking requires a $1,565 fee (see 47 C.F.R. § 1.1104), this fee is not payable at the time of filing the petition. Rather, the rulemaking fee is payable at the time of filing the application for change. See "Mass Media Services Fee Filing Guide" n. 12. Because the fee for Lea County's petition for rulemaking is not due until Lea County files its application for change (in addition to the fee for the minor change), your "Fee Refund Request" will be granted.

Accordingly, a check for $1,565, payable to Lea County Broadcasting, will be forwarded you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Mr. Mark L. Billings
Director-Tariffs
GTE Telephone Operations
600 Hidden Ridge, HQE01F04
P.O. Box 152092
Irving, Texas 75015-2092

Dear Mr. Billings:

This is in response to your request for a refund of the fee payment submitted by Contel Corporation (Contel), shortly before its merger with GTE Corporation, in connection with its filing of a petition for waiver of Part 69 of the rules requesting permission to establish a new access tariff rate element related to Operator Services.

You state that a refund is due because Section 1.1105 is unclear as to whether the filing of petitions for waiver of the Part 69 tariff rules is subject to a fee requirement.

In its recent reconsideration of its FEES II decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, (1990), reconsidered in part, 6 FCC Rcd 5919, 5923 (1991). More specifically, the Commission clarified that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of its rules. Id.

Accordingly, your request for a refund is granted. As you have requested, a check, drawn in the amount of $4,660.00 and made payable to GTE Telephone Operations, will sent to you at the above address at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

NOV 29 1991

OFFICE OF
MANAGING DIRECTOR

Mr. David C. Schaberg
P.O. Box 21055
Lansing, Michigan 48909-1055

Dear Mr. Schaberg:

This is in response to your requests for a waiver and refund of filing fees related to your two applications for extension of time to construct a new FM station at Glen Arbor, Michigan. Your requests were directed to the FM Branch of the Mass Media Bureau.

First, let me apologize for failing to respond earlier to your requests for refund and waiver of your fee payments. You should note, however, that the Commission's rules require that petitions for a fee waiver or refund are handled by the Office of the Managing Director and not with the Bureau having processing responsibility for the application underlying the fee payment. See 47 C.F.R. § 1.1115(c).

After you obtained your construction permit for the station at Glen Arbor, you filed a petition for rulemaking requesting to substitute Channel 240C2 for Channel 240A at Glen Arbor. The Mass Media Bureau granted your petition and initiated the requested rule making. See Amendment of Section 73.202(b) (Glen Arbor and Scottsville, Michigan), Docket 89-385, 4 FCC Rcd 6700, released September 6, 1989. You also filed an application to modify your construction permit consistent with your proposal under consideration in the rulemaking. On August 20, 1990, while the rulemaking was pending, you filed an application for an extension of time to complete construction of the Glen Arbor station. You submitted the requisite application fee accompanied by a request for refund because you believed that sufficient time had passed for the rulemaking to be concluded and your modification application granted.

Subsequently, the Bureau amended the FM Table of Allotments, but substituted Channel 238C2, rather than Channel 240C2, for Channel 240A at Glen Arbor (due to technical deficiencies in your proposal), effective February 25, 1991. See Report and Order in Docket 89-385, 6 FCC Rcd 147, released January 11, 1991. On March 30, 1991, you filed a request for a second extension of time to complete construction, stating that you would soon file an application to amend your construction permit in the manner permitted by the rulemaking. You submitted no fee to cover this

extension, but advised that your earlier fee payment should be credited to this filing since you had received no response on your petition for waiver, and you again stated that the staff's failure to timely conclude the rulemaking proceeding made necessary your request for the extension of time.

Our review of the merits of your requests discloses that no waiver or refund of the required fee payments is warranted. You obtained a construction permit for an FM station at Glen Arbor and, before constructing the station, filed for a change in the station's assigned channel. Your extension applications were filed while you awaited the outcome of proceedings initiated by you in lieu of constructing the Glen Arbor station. Nothing in the rules or elsewhere entitles an applicant to rely on an expectation of when a particular matter before the Commission will be concluded in order to obtain a waiver or refund of a required fee, since the timing of any Commission action depends on the workload of the staff and the complexity of the particular case. In the instant case, the pendency of the rulemaking and your application to modify do not justify non-payment of a required fee. You voluntarily decided to withhold construction of your station. Had you constructed the station in a timely fashion pursuant to the terms of the initial construction grant, no fees would be due.

Accordingly, your requests for waiver and refund of the fee requirement are denied.

As a final matter, the Commission has ruled that if a request for fee waiver is denied and the fee has not been submitted with the waiver request, the underlying application will be dismissed. See FEES II, 5 FCC Rcd 3558, 3572 (1991). In view of the delay in resolving your requests, you will be afforded additional time to submit your fee payment. Failure to make payment within thirty days from the date of this letter will result in the dismissal of your second construction permit and, the consequent dismissal of your station authorization.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 91-295**

In the Matter of

Amendment of Part 90 to Increase the Number of Frequencies in the 72-76 MHz Band for Low-Power Mobile Use — RM-7182

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 3, 1991; Released: October 31, 1991**

**Comment Date: December 23, 1991**
**Reply Comment Date: January 7, 1992**

By the Commission:

## I. INTRODUCTION

1. On November 3, 1989, the Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC), filed a Petition for Rule Making (Petition)[1] requesting an increase in the number of 72-76 MHz frequencies available in the Manufacturers Radio Service for low-power use. No comments responsive to the Petition were filed. By this *Notice of Proposed Rule Making* (*Notice*), we propose to amend Part 90 of the Commission's Rules to make available 20 additional frequencies in the 72-76 MHz band for low-power mobile use by licensees in the Manufacturers Radio Service.

## II. BACKGROUND/DISCUSSION

2. The frequency band 74.8 MHz to 75.2 MHz is allocated for Aeronautical Radionavigation use. Ground-based aeronautical marker beacon transmitters operate in this band on the frequency 75.0 MHz with an authorized bandwidth of 6 kHz. The adjacent bands, 74.6-74.8 MHz and 75.2-75.4 MHz, are allocated for Fixed and Mobile use, but are currently not used because they serve as guard bands to minimize interference to the airborne marker beacon receivers operating at 75.0 MHz.[2]

3. MRFAC petitions that because the Footnote 572 constraint on the use of the guard bands expired on December 31, 1989, the Commission should channelize the two bands and make the new frequencies available to the Manufacturers Radio Service for low-power operations. MRFAC thus petitions that Sections 90.79 and 90.257 of the Rules, 47 C.F.R. §§ 90.79 and 90.257, be amended to expand the number of 72-76 MHz frequencies available for low-power use by the Manufacturers Radio Service.[3]

4. With the expiration of the footnote 572 constraint, it is now possible to channelize and use new frequencies in the guard bands for other purposes. The MRFAC petition proposes that each guard band be divided into 9 channels, resulting in 18 additional frequencies spaced 20 kHz apart. After analysis of the MRFAC petition, we find that by modifying MRFAC's frequency plan in each guard band, two additional channels can be obtained. Therefore, we propose instead a channeling plan that contains ten 20 kHz-wide channels in each guard band, resulting in a total of 20 additional channels.

5. In its petition, MRFAC indicates that Footnote US273 to Section 2.106 currently limits stations in the fixed and mobile services in the two guard bands to a maximum power of 1 watt, and that this is the same as the power limitation for mobile use of the 72-76 MHz frequencies as specified in Section 90.257(b)(2) of the Rules. The 1 watt limitation limits the usefulness of these frequencies for purposes other than mobile operations so we are therefore proposing that the same conditions outlined in Sections 90.257(b)(1) and (b)(2) govern the additional low-power mobile channels.[4] These provisions should maintain protection of the 75.0 MHz aeronautical marker beacon frequency. We solicit, however, comments on whether additional protection to the marker beacon frequency is necessary, and if so, how this can be accomplished while still providing for land mobile operations in the guard bands.

6. MRFAC also proposes that nine of the new frequencies be designated for digital transmission applications for such manufacturing operations as inventory control, bar code readers, remote control, etc. MRFAC asserts that conventional (analog) voice operations have a high potential for interference to co-channel non-voice operations due to the mobility characteristics of portable hand-held units, and that restricting some of the new frequencies to digital transmissions would minimize such interference and enhance the safety of personnel and

---

[1] RM-7182, Report 1804, December 20, 1989.

[2] Footnote 572 to the Table of Frequency Allocations in Section 2.106, 47 C.F.R. § 2.106, states that the frequency 75.0 MHz is assigned to aeronautical marker beacons, and that until December 31, 1989, internationally, administrations should refrain from assigning frequencies to stations of other services in the adjacent bands of 74.6-74.8 MHz and 75.2-75.4 MHz (guard bands). Footnote 572 also states that in the future every effort should be made to improve further the characteristics of airborne receivers.

[3] Section 90.79 of the Rules, 47 C.F.R. § 90.79, governs frequency assignments in the Manufacturers Radio Service and Section 90.257, 47 C.F.R. § 90.257, governs the assignment and use of frequencies in the 72-76 MHz band for fixed and mobile operations. Currently, §§ 90.79 and 90.257 of the Rules permit the Manufacturers Radio Service to use 68 frequencies in the 72-76 MHz band for fixed use on a shared basis with other Land Mobile, Aviation, and Maritime Mobile Radio Service users, and 30 frequencies in the 72-76 MHz band for mobile use, ten of which are shared with Part 90 users in the Forest Products, Special Industrial, and Railroad Radio Services.

[4] Pursuant to § 90.257(b)(1), mobile operations in the 72-76 MHz band are permitted on a secondary basis to television reception on Channels 4 and 5. § 90.257(b)(2) specifies a maximum mobile transmitter power of one watt, and that while each station will be authorized as a mobile station, it may also be used to provide the operational functions of a base or fixed station.

property. In this *Notice* we are not proposing to restrict the use of the additional channels to a specific modulation technique. We are interested, however, in minimizing potential interference to all operations using the new channels. Therefore, we solicit comments on the expected use of the frequencies, the type of modulation, digital or analog, that would be potentially dominant, and whether it is necessary that some frequencies should be restricted to digital only use because of potential interference from digital to analog systems. Also, because there are currently ten mobile-only frequencies being shared by four Part 90 radio services, we ask for comments whether additional private land mobile radio services should be included in sharing these new frequencies.

## III. CONCLUSION

7. In summary, this *Notice* proposes to amend Section 90.79(c) to provide 20 additional frequencies in the 72-76 MHz band for low-power mobile use in the Manufacturers Radio Service. Operations on these frequencies will be subject to the provisions of Section 90.257(b).

## IV. PROCEDURAL MATTERS

**Ex Parte Rules - Non-Restricted Proceeding**

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* - 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

**Initial Regulatory Flexibility Analysis**

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

**Comment Dates**

10. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commissions Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **December 23, 1991,** and reply comments on or before **January 7, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

11. For further information concerning this rule making, contact Eugene Thomson, Private Radio Bureau, Room 5202, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

12. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r).

FEDERAL COMMUNICATION COMMISSION

Donna R. Searcy
Secretary

## APPENDIX

It is proposed to amend 47 C.F.R. Parts 2 and 90 as follows:

1. The authority citation for Part 2 continues to read as follows:

**Authority: Sections 4, 302, 303, and 307, of the Communications Act of 1934, as amended, 47 U.S.C. § 154, 302, 303, and 307, unless otherwise noted.**

2. 47 C.F.R. § 2.106 is amended by adding entries in the FCC use designators column for the frequency bands 74.6-74.8 and 75.2-75.4 as listed in the United States table column to read as follows:

**§ 2.106 Table of Frequency Allocations.**

| International table | United States table | FCC use designators |
|---|---|---|
| | * * * * * | |
| (1) (2) (3) | (4) (5) | (6) (7) |
| | * * * * * | |
| | 74.6-74.8 FIXED MOBILE<br>74.6-74.8 FIXED MOBILE<br>572 US273 572 US273 | PRIVATE LAND MOBILE (90) |
| | * * * * * | |
| | 75.2-75.4 FIXED MOBILE<br>75.2-75.4 FIXED MOBILE<br>572 US273 572 US273 | PRIVATE LAND MOBILE (90) |

* * * * *

3. The authority citation for Part 90 continues to read as follows:

**Authority: Secs. 4, 303, and 331, 48 Stat. as amended, 1066, 1082, 47 U.S.C. 154, 303 and 332, unless otherwise noted.**

4. 47 C.F.R. § 90.79 is amended by revising the frequency table in paragraph (c) by adding the frequencies 74.61, 74.63, 74.65, 74.67, 74.69, 74.71, 74.73, 74.75, 74.77, 74.79, 75.21, 75.23, 75.25, 75.27, 75.29, 75.31, 75.33, 75.35, 75.37, and 75.39 MHz together with their associated class of station(s) and limitations to read as follows:

**§ 90.79 Manufacturers Radio Service.**

* * * * *

(c) * * *

Manufacturers Radio Service Frequency Table

| Frequency or band | Class of station(s) | Limitations |
|---|---|---|
| * * * * * | | |
| 74.61 | do | 2 |
| 74.63 | do | 2 |
| 74.65 | do | 2 |
| 74.67 | do | 2 |
| 74.69 | do | 2 |
| 74.71 | do | 2 |
| 74.73 | do | 2 |
| 74.75 | do | 2 |
| 74.77 | do | 2 |
| 74.79 | do | 2 |
| 75.21 | do | 2 |
| 75.23 | do | 2 |
| 75.25 | do | 2 |
| 75.27 | do | 2 |
| 75.29 | do | 2 |
| 75.31 | do | 2 |
| 75.33 | do | 2 |
| 75.35 | do | 2 |
| 75.37 | do | 2 |
| 75.39 | do | 2 |

* * * * *

5. 47 C.F.R. § 90.257 is amended by revising the first sentence in paragraph (b)(1) to read as follows:

**§ 90.257 Assignment and use of frequencies in the band 72-76 MHz.**

* * * * *

(b) * * *

(1) Mobile operation on frequencies in the 72-76 MHz band (see §§ 90.67(b), 90.73(c), 90.79(c), and 90.91(b)) is subject to the condition that no interference is caused to the reception of television stations operating on Channel 4 or 5. * * *

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-497

In the Matter of

Amendment of Part 65 of
the Commission's Rules to
Prescribe Components of the
Rate Base and Net Income
of Dominant Carriers

DECISION ON REMAND

Adopted: October 15, 1991; Released: October 31, 1991

By the Commission:

## I. INTRODUCTION

1. In *Illinois Bell v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded to the Commission for further consideration two issues addressed in the Commission's *Rate Base Orders*:[2] (1) the exclusion of non-cash expenses, such as depreciation, from lead-lag studies used to determine the cash working capital allowance; and (2) the presumptive exclusion from the rate base of the premium paid for plant (*i.e.*, plant acquisition adjustment) in the case of plant without traffic acquired from a non-affiliated carrier. In this Order, we reaffirm our decision to exclude non-cash expenses from lead-lag studies. We find that the time lag between recording and actual recovery of depreciation and other non-cash expenses need not be recognized in determining cash working capital because that lag is already compensated for in the allowed rate of return. We alter our treatment of the plant acquisition adjustments so as to allow a carrier presumptively to include in the rate base the premium paid for plant without traffic acquired from a non-affiliated carrier.[3] This treatment is appropriate because such transactions are at arm's length and do not increase the revenue requirement for existing ratepayers solely by virtue of an ownership change.

## II. BACKGROUND

2. A carrier's rate base consists generally of telecommunications plant, noncurrent assets, materials and supplies, and cash working capital.[4] Under a traditional rate base/rate of return regulatory system, it is necessary to determine the rate base both to calculate the return-on-investment component of the revenue requirement and to compute the earned rate of return. Carriers subject to price cap regulation no longer use revenue requirements to set rates. The price cap plan we adopted for the largest local exchange carriers (LECs), however, still requires rate base calculation in order to determine earned rate of return.[5]

3. Prior to divestiture, the components of American Telephone and Telegraph's (AT&T) rate base were established in ratemaking proceedings. The Commission concluded the last AT&T rate case that comprehensively addressed rate base issues in 1977.[6] After divestiture, the Commission adopted §§65.800 -.830 of its Rules,[7] which, for the most part, codified the Commission's established methods for determining rate base. These rules apply to both LECs and dominant interexchange carriers.[8]

4. Working capital, in a regulated environment, is the capital required to finance the day-to-day activities of the business.[9] In the *Docket 19129 Decision*, the Commission found that working capital for regulated entities consisted of "cash and cash items necessary to pay current expenses" and "investment in materials and supplies." The Commission decided that it would use lead-lag studies[10] to determine the cash element of AT&T's working capital,

---

[1] Illinois Bell Telephone Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell*).

[2] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987) (*Rate Base R&O*), *recon.*, 4 FCC Rcd 1697 (1989) (*Rate Base Recon. Order*) (*Rate Base Orders* or *Rate Base Proceeding*); *remanded sub nom.*, Illinois Bell Telephone Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990).

[3] A premium, or plant acquisition adjustment, results from a carrier paying an amount for plant above that plant's net original cost at the time it was put into regulated service less depreciation reserve. We will refer to this premium, recorded in Account 2005 of the Uniform System of Accounts, as "plant acquisition adjustment(s)" throughout this Order.

[4] *See* 47 C.F.R. § 65.820.

[5] Policy and Rules Concerning Rates for Dominant Carriers, *Notice of Proposed Rulemaking*, 2 FCC Rcd 5208 (1987), *Further Notice of Proposed Rulemaking*, 3 FCC Rcd 3195 (1988), *Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd 2873 (1989), *Supplemental Notice of Proposed Rulemaking*, 5 FCC Rcd 2176 (1990), *Second Report and Order*, 5 FCC Rcd 6786 (1990), *Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 665 (1991), *Order on Reconsideration*, FCC No. 91-115, Mimeo No. 38145 (released April 17, 1991). The earned rate of return is used under price cap regulation to determine the shared earnings between LECs and ratepayers, and to determine whether a carrier with low earnings is eligible for automatic increases in its price cap indices. *See Second Report and Order*, 5 FCC Rcd at 6806-6807.

[6] American Telephone and Telegraph Co., *Phase II Final Decision and Order*, 64 FCC 2d 1, (1977) (*Docket 19129 Decision*), *recon. in part*, 67 FCC 2d 1429 (1978) (*Docket 19129 Recon. Decision*).

[7] 47 C.F.R. §§ 65.800 -.830.

[8] *Rate Base Orders*, *supra* at n. 2.

[9] The Commission adopted this definition in the AT&T and Western Union Private Line Cases, *Final Decision*, 34 FCC 217, 221 (1963) ("[Working capital] furnishes the means by which business is transacted. It meets the payroll and the current bills for materials and other running expenses. A capital fund for these purposes, present from day to day in amounts adequate for the reasonable needs of the Company, must be supplied." *quoting* Vincennes Water Supply Co. v. Public Service Comm'n, 34 F.2d 5, 8 (7th Cir. 1939)), *aff'd sub nom. Wilson & Co. v. U.S.*, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

[10] For a discussion of lead-lag studies, *see infra* para. 9.

*i.e.*, the cash working capital allowance. The Commission concluded that, because cash working capital is the amount of investor-supplied cash required to finance the day-to-day activities of the business, non-cash expenses, which do not represent a current expenditure of cash, should not be included in leadlag studies.[11]

5. In the *Rate Base Orders*, during the course of examining its rate base rules, the Commission again addressed its treatment of cash working capital. In comments filed in that rulemaking proceeding, carriers argued that computation of lead-lag studies should be changed to include non-cash expenses. They argued that lead-lag studies that exclude a non-cash expense such as depreciation expense are unfair to shareholders because the studies fail to consider the time lag between the reduction of the rate base through depreciation of an asset and the recovery from ratepayers of the depreciation expense.[12] The Commission reaffirmed the position it had taken in the *Docket 19129 Decision*, holding that non-cash expenses did not require the outlay of cash, and therefore were not within the scope of the definition of cash working capital.[13]

6. Plant acquisition adjustments arise when a carrier purchases telecommunications plant from another regulated telecommunications entity. The purchasing carrier can record in its plant accounts only the original cost less depreciation reserve of the plant. Plant acquisition adjustment is the difference between the purchase price of that plant and the amount recorded in the carrier's plant accounts. In the *Docket 19129 Recon. Decision*, the Commission, on its own motion, considered the rate base treatment of plant acquisition adjustments. The Commission placed upon the carrier the burden of proving that any amount of the adjustment should be included in the rate base.

7. The Commission did not distinguish between transactions involving affiliates and non-affiliates; nor did it treat transactions involving plant without traffic differently from those involving plant with traffic. Rather, the Commission reasoned that "acquisition by one utility of the property of another utility presents the possibility of abuse, or at least confuses the question of the proper value to be placed on such property for ratemaking purposes."[14] In the *Rate Base Proceeding*, carriers argued, *inter alia*, that transactions between non-affiliated carriers resulting in plant acquisition adjustments should not fall within the Commission's presumption of exclusion from the rate base. The Commission, however, reaffirmed its treatment of plant acquisition adjustments on the basis of the reasoning stated in the *Docket 19129 Recon. Decision*.

8. On review before the D.C. Circuit, the carriers reiterated the positions they had taken in the *Rate Base Orders* proceeding. In regard to the cash working capital issue, the court found that the Commission's rationale for excluding non-cash expenses such as depreciation was insufficient. The court remanded this issue to the Commission for "further explication."[15] The court found that the Commission had adequately justified presumptively excluding from the rate base all plant acquisition adjustments resulting from purchases of plant with traffic, as well as those resulting from purchases from an affiliate of plant without traffic. However, the Court remanded for further consideration the Commission's policy of presumptively excluding from the rate base a plant acquisition adjustment resulting from a transaction in which a carrier purchases plant without traffic from a non-affiliate.[16]

## III. DISCUSSION

### A. Cash Working Capital

9. To determine the cash working capital component of a carrier's interstate rate base, this Commission has traditionally used the lead-lag study approach.[17] As the D.C. Circuit has observed," [lead-lag studies essentially determine] whether the company has need for idle cash and is entitled to a cash working capital addition to rate base."[18] This approach determines a cash working capital allowance by conducting studies which measure the cash needed by the carrier to cover its cash expenses between the time expenses are paid and the time revenues are received. "Lead" refers to those revenue and expense items that are received or paid before a service is rendered. "Lag" refers to those revenue and expense items that are received or paid after service is rendered. Mechanically, lead-lag studies determine the number of days between receipt of revenues and payment of expenses; then that net number of revenue lag days is multiplied by the average daily cash expenses to determine cash working capital. For example, assume a revenue lag of 45 days and an expense lag of 30 days; the net revenue lag days are 15. If the carrier's average daily cash expenses are $10, then the carrier's cash working capital allowance would be $150 (15 days multiplied by $10).[19]

10. We continue to believe that our lead-lag study approach should not include lags related to non-cash expenses such as depreciation. While we recognize, as the court noted, that depreciation expense relates to a cash expense that occurred at the time of investment,[20] depreciation expense is different from the types of cash expenses included in lead-lag studies in that it does not require a *current* outlay of cash and thus does not give rise to a need for cash working capital. The Commission has always viewed lead-lag studies as having a single, narrow

---

[11] *Docket 19129 Decision*, 64 FCC 2d at 76, n.1. *See also*, American Telephone and Telegraph Co., *Phase II Decision of the Administrative Law Judge*, 64 FCC 2d 131, 404 (1977) (*Initial Decision*).

[12] *See* Ameritech Comments on Reconsideration at 3 ("[t]he problem is that the rate base is reduced by *recorded* depreciation which occurs when service is provided, not when ratepayers pay for such service. Recovery of depreciation does not occur until the ratepayers pay for service.").

[13] *Rate Base Recon. Order*, 4 FCC Rcd at 1700. *See also Docket 19129 Decision*, 64 FCC 2d at 72, *affirming Initial Decision*, 64 FCC 2d at 404-405.

[14] *Docket 19129 Recon. Decision*, 67 FCC 2d at 1438.

[15] *Illinois Bell*, 911 F.2d at 784.

[16] *Id.* at 785.

[17] We note that in the *Rate Base Orders*, the Commission also adopted a simplified alternative to the lead-lag methodology, as well as an even simpler methodology for small carriers. *See* 47 C.F.R. §65.820(e).

[18] Trunkline LNG Co. v. FERC, 921 F.2d 313, 318 (D.C. Cir. 1990).

[19] Minimum bank balances, another element of working capital are added to the resulting figure. This Commission includes materials and supplies in the rate base separately. 47 C.F.R. § 65.820(b).

[20] *Illinois Bell*, 911 F.2d at 783.

purpose: determining the amount of cash required for the day-to-day activities of the business. We have not viewed lead-lag cash working capital studies as a generalized method of accounting for each and every timing difference between the outlay of investor funds and the recovery of that outlay from ratepayers, and we see no reason to change our views on this issue. Moreover, we note that many regulators using the lead-lag approach exclude non-cash expenses on this basis.[21]

11. Throughout this proceeding, carriers have argued that our lead-lag studies deprive investors of full compensation on their investment by failing to consider the time lag between the reduction of the rate base through depreciation of an asset and the recovery from ratepayers of the depreciation expense. As discussed below, we conclude that investors are not denied earnings opportunities by this approach since the time lag is compensated for in the allowed rate of return.

12. In finding the Commission's prior explanation of the exclusion of depreciation from lead-lag studies to be inadequate, the court focused on the following example from the carriers' pleadings:

> [Assume] a $1000 investment with a 4-year life and [a] 45-day lag between when service is rendered and payment is made. [After two years], the rate base [has been depreciated to $500, but the carrier] has collected only $469. Thus, the investor is short $31 - he does not earn [a return] on it in the rate base: it has not been returned for reinvestment. As this phenomenon continues over the life of the plant, ratepayers have continuous use of $31 of the investor's money at no cost.[22]

13. We acknowledge that the time lag demonstrated in the example does exist, and that investors will only recover the amount in the lag -- the $31 -- a certain number of days after the asset is completely removed from the rate base. It does not follow, however, that ratepayers have the "continuous use" of this $31 at no cost. Rather, the time lag is recognized by investors, and is compensated for in the allowed rate of return, as opposed to being factored into the calculation of a carrier's cash working capital. That is, in prescribing an allowed rate of return, this Commission uses market-based cost of capital methodologies which incorporate investors' perceptions and requirements, including the investors' perception of the time lag. Thus, to use the above example, the ratepayers' cost for the use of the investors' $31 is the higher rate of return investors receive because of their perception of the Commission's historical depreciation recovery policy. If depreciation were included in lead-lag studies, and thus, in cash working capital, investors would not expect as high a rate of return, and thus, the allowed rate of return would, all other things remaining constant, be lower. [23]

14. Our exclusion of depreciation expenses in the lead-lag approach is well known; it is a matter of public record and has been in place for over fourteen years. Investors have long been aware of the effect of this approach. They are familiar with the fact that every cash flow has to be adjusted for timing, and thus, to the extent that the lag involving depreciation recovery exists, capital markets have knowledge of and adjust for the time lag. Markets adjust for this timing through the price of the stock. That is, the price an investor is willing to pay for a share of stock is a function of the timing as well as the size of future dividends. Therefore, investors, knowing that their capital invested in the regulated enterprise will be returned to them with this lag, demand a higher return than they would if the lag did not exist. Again, because we use market-based cost of capital methodologies (which take into account investor perception and requirements) in prescribing a rate of return, the revenue lag of which the carriers complain is reflected in, and compensated for, by our allowed rate of return. [24]

**B. Property Acquisition Adjustments**

15. In the *Rate Base Orders*, the Commission reaffirmed its historical practice of presumptively excluding the amounts recorded in Account 2005 (*i.e.*, plant adjustments) from the rate base unless a carrier can specifically justify the amount be included on a case-by-case basis. In response to complaints that its case-by-case standard was vague, the Commission clarified that, as a general rule, plant adjustments resulting from the purchase of plant with traffic (*i.e.*, buying another carrier's plant along with the right to provide service to the customers that are served by that plant) require a higher degree of justification than adjustments resulting from the purchase of plant without traffic.

16. The Commission also stated that rate base recognition would beeasier to justify when a carrier purchases plant without traffic from another carrier at or below the price it could obtain from other sources. This is because both the carrier and the ratepayer stand to benefit from such an acquisition assuming the plant is needed. However, in those cases where the purchase involves plant with traffic, a showing must be made why rate payers should pay rates based on a higher value for equipment and service that are the same as before the acquisition. In excluding Account 2005 from the rate base, the Commission did not distinguish between cases involving the purchase of plant with traffic from non-affiliates and those involving the purchase of plant without traffic from non-affiliates.

17. The court found that the Commission adequately justified its presumption of exclusion from the rate base of plant acquisition adjustments resulting from purchases of plant with traffic from an affiliate or a non-affiliate and

---

[21] *See* Opinion 55, Southern Edison Company, Docket No. E-8570, *Opinion And Order*, 8 FERC 61.099 (1979); Western Massachusetts Electric Co., D.P.U. 89-255, *Order of the Massachusetts Dept. of Public Utilities*, 114 P.U.R. 4th 1 (1990); Indiana Gas Co., Inc., Cause No. 38080, *Order of Indiana Utility Regulatory Commission*, 86 P.U.R. 4th 241 (1987); *but see* Office of Consumers' Counsel v. Public Utilities Commission, 495 N.E. 2d 930 (Ohio 1986) (affirming the PUC's inclusion of non-cash expenses in lead-lag studies).

[22] *Illinois Bell*, 911 F.2d at 783.

[23] We note that there is no legally mandated methodology for determining cash working capital. Thus, we could change our policy and allow carriers to include depreciation expense in lead-lag studies. However, if we were to make such a significant change in our rate base practices, we would also have to consider changes in the allowed rate of return.

[24] *See* Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order*, 5 FCC Rcd 7507, 7521, para. 120 (1990).

plant without traffic from an affiliate. However, it remanded for further Commission consideration the policy of presumptively excluding from the rate base the plant acquisition adjustment resulting from a transaction in which a carrier purchases the plant without traffic from a non-affiliate. The court stated that the Commission had given no reason for assuming that an acquisition price for plant without traffic from a non-affiliated carrier would not reflect fair market value.

18. After further review of this matter, we conclude that there is no reason to continue to presumptively exclude from the rate base the premium paid for plant without traffic acquired from a non-affiliated carrier. We believe that a transaction involving the acquisition of plant without traffic from a non-affiliate should be treated no differently than any other arm's length transaction with a non-affiliate. When the price of anasset is determined by an arm'slength transaction in the normal course of business, we believe there is reasonable assurance that the price paid would not be manipulated to the detriment of ratepayers. We see no incentive for a carrier to inflate the rate base in such situations. Further, since such a transaction would not involve traffic, it would not result in an increased revenue requirement for existing ratepayers that is attributed solely to a change in ownership. Therefore, we will presumptively allow the full cost of plant acquired without traffic from a non-affiliate to be included in the rate base.

## IV. CONCLUSION

19. We reaffirm our rule to exclude non-cash expenses from lead-lag studies used to determine cash working capital. Although we recognize the time lag between reduction of the rate base and recovery of non-cash expenses resulting from such reduction, any amount of investor capital included in the time lag is compensated for in our rate of return. We also will now allow carriers to presumptively includein their rate bases any plant acquisition adjustments which result from acquisition of plant without traffic from a non-affiliated carrier. The adjustments resulting from such arm's length transactions provide no incentive for an unnecessary inflation in rate base.

## V. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 4(j), 201-205, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 220, and 47 C.F.R. §65.820(d) the Commission's prescribed methodology for calculating cash working capital IS REAFFIRMED.

21. IT IS FURTHER ORDERED, that plant acquisition adjustments found in Account 2005 of the Uniform System of Accounts that are the result of an acquisition of plant without traffic from a non-affiliated carrier presumptively ARE TO BE INCLUDED in the rate base effective from the date of adoption of this Order.

22. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 91-334

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54 - 63.58 | ) | CC Docket No. 87-266 |

**FURTHER NOTICE OF PROPOSED RULEMAKING**
**FIRST REPORT AND ORDER AND**
**SECOND FURTHER NOTICE OF INQUIRY**

Adopted: October 24, 1991 Released: November 22, 1991

Comment Date: January 23, 1992
Reply Comment Date: February 24, 1992

By the Commission: Commissioners Barrett, Marshall, Quello and Duggan issuing separate statements.

**Table of Contents**


| | | Paragraph No. |
|---|---|---|
| I. | Introduction | 1 |
| II. | Background | 3 |
| III. | Further Notice of Proposed Rulemaking | 6 |
| | A. Commission Goals | 7 |
| | B. Video Dialtone | 10 |
| | 1. Video Dialtone and the Public Interest | 12 |
| | a. Infrastructure Considerations | 13 |
| | b. Marketplace Efficiency Considerations | 15 |
| | c. Diversity Considerations | 17 |
| | 2. Video Dialtone and Advanced Network Design | 18 |
| | 3. Authority to Implement Video Dialtone | 20 |

a. Statutory Authority 20

b. Modification of Final Judgment 22

C. Implementation of Video Dialtone 23

1. Objectives for Implementing Video Dialtone 24

2. Regulatory Approaches 25

3. Revisions to Section 63.54 37

4. Other Rule Changes 41

IV. First Report and Order 43

A. Applicability of Section 613 to Interexchange Carriers 44

B. Franchising under Section 621 47

V. Second Further Notice of Inquiry 53

A. Direct Provision of Video Programming by Local Exchange Carriers 53

B. Investment Incentives 57

VI. Conclusion 59

VII. Ex Parte Presentations 60

VIII. Initial Regulatory Flexibility Analysis 61

IX. Comment Filing Dates 69

X. Ordering Clauses 70

APPENDIX A: PARTIES FILING COMMENTS

APPENDIX B: PROPOSED RULE CHANGES

## I. Introduction

1. We here propose to modify our rules to permit local telephone companies to provide video dialtone, thereby encouraging development of a competitive video marketplace in the United States. A video dialtone policy should serve the public interest by promoting the competitive provision of non-programming video and non-video services by both telephone companies and other service providers. In order to encourage development of a truly competitive and innovative communications infrastructure that ensures a

diversity of information sources and that is flexible enough to accommodate technological advances, the Commission should permit advanced telecommunications networks to develop free from unnecessary regulation. Moreover, by ensuring that artificial regulatory barriers do not thwart the growth and satisfaction of consumer demand for video and non-video services, our proposal for video dialtone should encourage competition to develop wherever possible.

2. In this Further Notice of Proposed Rulemaking (FNPRM), we consider the public interest benefits of a video dialtone model for the distribution of video programming by telephone companies. We describe how the proposed video dialtone model meshes with the emerging advanced network and describe some of the basic characteristics of the video dialtone model. We also analyze our statutory authority to permit video dialtone and describe alternative regulatory approaches to implementing video dialtone and ask for comment on other possible approaches. We also ask for comment on proposed changes to our rules to facilitate the deployment of video dialtone and ask parties to identify other changes to our rules that may be desirable. In the First Report and Order, we conclude that the telephone/cable cross ownership ban of Section 613 of the Cable Communications Policy Act of 1984 (Cable Act)[1] does not apply to interexchange carriers. We also find that Section 621 of the Cable Act[2] does not mandate that a local exchange carrier or its customer-programmer obtain a municipal cable television franchise in order to offer video dialtone service. In the Second Further Notice of Inquiry, we examine the issue of direct provision of video programming by local exchange carriers (LECs) and seek comment on whether we should recommend to Congress that it make any changes in the current statutory prohibition. We also seek comment on what safeguards would be appropriate for local exchange carriers if they were permitted to provide video programming directly to subscribers. We also seek comment on whether any other statutory or regulatory changes would be desirable in order to expand investment incentives for video dialtone.

## II. Background

3. Over the past several decades, the Commission has on a number of occasions considered the proper role for local telephone companies in the distribution of video programming. Currently, Sections 63.54 - 63.58 of the Commission's rules,[3] and Section 613(b) of the Cable Act,[4] make it unlawful for any common carriers to "provide video programming directly to subscribers in its telephone service area."

---

1 Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq., 533.

2 47 U.S.C. § 541.

3 47 C.F.R. §§ 63.54-63.58.

4 47 U.S.C. § 533(b).

**4.** In 1987, the FCC issued a Notice of Inquiry (NOI) to review the telephone/cable cross ownership restrictions set forth in the Commission's rules and incorporated into the Cable Act.[5] Generally, the NOI sought comment on whether the original reasons for the cross-ownership rules were still valid, given changing technology and the developing communications marketplace; whether a different regulatory approach would better serve the public interest; and whether, in order to encourage an environment of greater competition in the provision of cable facilities and services, direct provision of video programing by telephone companies should remain restricted.

**5.** In 1988, the FCC issued the Further Notice of Inquiry and Notice of Proposed Rulemaking (FNOI).[6] In the FNOI, the Commission tentatively concluded that the Commission should recommend to Congress that the cross-ownership ban be repealed or modified to permit the local telephone companies to provide video programming within their service areas subject to Computer III-type safeguards.[7] Additionally, we sought comment on: whether the Cable Act required the telephone common carriers or customer programmers of such carriers to obtain a local franchise as a prerequisite to providing such service; whether the cable cross-ownership ban applied to interexchange carriers; whether the standards of affiliation between the local telephone companies and cable operators should be modified to permit a greater degree of ownership affiliation; and whether we should grant waivers of the cross ownership ban for "good cause" for advanced integrated broadband systems. The Commission received extensive comments on its proposed conclusions.[8]

---

[5] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 2 FCC Rcd 5092 (1987); 47 U.S.C. § 533(b); 47 C.F.R. §§ 63.54-63.58.

[6] See Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, 3 FCC Rcd 5849 (1988) (FNOI).

[7] The Computer III safeguards included a set of cost accounting safeguards to protect against possible cross-subsidization of nonregulated activities, as well as a series of reporting and disclosure requirements to protect against discrimination. See Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, Report and Order, 104 FCC 2d 958 (1986) (Computer III), reconsideration, 2 FCC Rcd 3035 (1987) (Phase I Reconsideration), further reconsideration, 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), Phase II Order vacated California v. FCC, 905 F.2d 1217; pending petition for review of Phase II Order and Phase II Reconsideration Order pending, BellSouth v. FCC (9th Cir. No. 88-7290, filed April 20, 1988).

[8] The history of the Commission's rules regarding the ownership of cable television systems and provision of video programming by telephone companies is set forth more fully in the FNOI, 3 FCC Rcd at 5849, paras. 2-9

## III. Further Notice of Proposed Rulemaking

**6.** In light of the comments filed in the record and the evolving technology of public telecommunications networks, we examine first, the Commission's earlier determination that LEC entry into the cable television business would best serve the public interest. We tentatively conclude here that a "video dialtone" policy will provide the best foundation to achieve our goals of promoting the development of an efficient, nationwide, publicly accessible, advanced telecommunications infrastructure, facilitating robust competition, and fostering the First Amendment goal of ensuring a diversity of information sources.[9] Video dialtone would be common carrier-based with the addition of competitive non-common carrier services that would provide end users access to video programming and other information sources. We envision video dialtone as analogous to the ordinary telephone dialtone so as to give consumers access to a wide variety of services. These services might include video programming (provided by entities other than the LECs), videotext, and videophone, as well as other advanced telecommunications services. We tentatively conclude that deployment of video dialtone is permitted under the Cable Act and examine alternative ways video dialtone could be implemented. We further tentatively conclude that a video dialtone approach utilizing a two-level gateway would best serve our objectives and invite comment on the feasibility of deploying such a system as well as the advantages and disadvantages to the public of so proceeding. We recognize other regulatory approaches to implementing video dialtone and seek comment on such alternatives. Finally, we examine what changes to our rules are necessary or desirable for the deployment of video dialtone and whether our rules create incentives or disincentives for investment in an advanced infrastructure.

### A. Commission Goals

**7.** At the outset, we revisit and reformulate the Commission's goals in this proceeding based upon the comments filed in this proceeding as well as upon technological advances. First, we believe that under Section 1 of the Communications Act (the Act)[10], the Commission should seek to make

---

(1988). Comments were submitted by the parties listed in Appendix A. In the Notice of Inquiry in MM Docket 89-600, we invited commenters to assess the extent to which the outcome in the instant proceeding could enhance or thwart the development of vigorous competition in the video marketplace. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Notice of Inquiry, 5 FCC Rcd 362, 363 n.18 (1989).

[9] See Associated Press v. United States, 326 U.S. 1, 20 (1945).

[10] Communications Act of 1934, as amended, 47 U.S.C. § 151. Section 1 defines the purpose of the Communications Act and mission of the FCC to "make available, so far as possible, to all the people of the United States a

available nationwide, publicly accessible, advanced telecommunications networks able to provide adequate facilities at reasonable charges. Such an advanced infrastructure might some day include switched, broadband capability and integrated voice, data, and video services.[11] Development of such an infrastructure may provide the opportunity for expanded economic development in many communities. The potential demand for video network capabilities is evidenced by the growing interest of educational, medical, governmental and business institutions in public broadband networks.[12] The need to reexamine our regulatory policies also is driven by the increasing convergence of previously separate markets embracing voice, data, graphics and video.[13] As cost-effective technology evolves, a Commission policy facilitating a universally available advanced telecommunications infrastructure capable of providing integrated voice, data and video services will serve the public interest.

8. Second, we believe that our regulatory approach should foster competition in the video and communications markets, so that free market forces rather than governmental regulation will determine the success or failure of new services. Market demand, rather than governmental edict, should stimulate the construction and use of advanced telecommunications networks, including broadband networks. Local exchange carrier provision of video dialtone could provide important competition for existing cable systems. We believe that by promoting competitive alternatives, consumers

---

rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges...."

[11] Broadband capability may, but need not, depend on the use of fiber optic cable transmission. Digital compression technology may make it possible to transmit video over existing copper facilities. See generally, High Speed Digital Subscriber Lines, IEEE Journal on Selected Areas in Communications, vol. 9, No. 6. (Aug. 1991).

[12] See U.S. Congress, Office of Technology Assessment, Critical Connections: Communications for the Future, OTA-CIT-407 (U.S. Government Printing Office, Jan. 1990); D. Bollier, 1988 Review Conference on New Electronic Technologies for the Elderly: Issues and Projects (Aspen Institute, Communications and Society Forum Report, 1989); L. Gallagher and D. Hatfield, Distance Learning: Opportunities in Telecommunications Policy and Technology (Washington Annenberg Program, 1989). See generally Networks of the Future: En Banc Hearing Before the FCC (May 1, 1991) [hereinafter Networks of the Future] (testimony of Dr. James A. Woodward, and Dr. Barry K. Gilbert). Copies of the written testimony given in the hearing have been placed in the record of this proceeding.

[13] See generally, Networks of the Future, supra note 12. See also M.L. Dertouzos, Building the Information Marketplace, Technology Review, Jan. 31, 1991 at 29; G.A. Keyworth, II and B. Abell, Competitiveness and Telecommunications, America's Economic Future: The House-to-House Digital Fiber Optic Network (Hudson Institute 1990).

will reap the maximum benefits from technological innovation. Moreover, by creating a favorable environment for competition in the distribution of video as well as other telecommunications services, we will enable consumers to benefit through increased services, lower prices and new features.

**9.** Finally, we believe that fostering a diversity of information sources for the American public should be a fundamental tenet underlying all policy decisions in this area.[14] In fact, diversity concerns heavily influenced our original decision in 1970 to ban LEC involvement in cable television.[15] Just as others have argued for a separation of content from conduit[16] in order to ensure the "widest possible dissemination of information from diverse and antagonistic sources,"[17] we must tailor our actions here and now to promote a diversity of information sources.

**B. Video Dialtone**

**10.** Our view of video dialtone is that it is an enriched version of video common carriage under which LECs will offer various non-programming services in addition to the underlying video transport. Video common carriage encompasses the transmission of entertainment video programming and other forms of video communications, both interstate and intrastate.[18] Video common carriage may be a private line, or point-to-multipoint offering; or it may be switched, although switched systems still are largely experimental. Ultimately, video common carriage could be offered over a broadband network analogous to the existing nationwide switched narrowband network. Such a network would enable any subscriber to transmit and receive a video signal to

---

14 See Associated Press v. U.S., 326 U.S. at 20.

15 See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 FCC 2d 307, 324-326 (1970) (Section 214 Certificates Order), recon. in part, 22 FCC 2d 746 (1970), aff'd, General Telephone Co. of S.W. v. United States, 449 F.2d 846 (5th Cir. 1971). We note that the diversity principle is an underlying goal in the cable area as well. See Sections 601(4) and 612(a) of the Cable Act, 47 U.S.C. §§ 521(4), 532(a).

16 See, e.g., Report to the President, The Cabinet Committee on Cable Communications, Office of Telecommunications Policy (1974); Video Program Distribution and Cable Television, National Telecommunications and Information Administration (NTIA) Report No. 88-233 (1988) at 54-58.

17 Associated Press v. U.S., 326 U.S. at 20.

18 Video communications may include "video programming" as defined in the Cable Act, i.e., programming provided by, or generally considered comparable to, programming provided by a television broadcast station, or it may be other video communications. See 47 U.S.C. § 522(16).

or from any other subscriber. Broadband video common carriage networks might run parallel to the narrowband network, or they might be integrated with switched narrowband communications.

**11.** Some forms of video common carriage are already offered. For example, video conferencing services currently are available from a number of interexchange carriers. In addition, transport of information and graphics that can appear on a video display terminal is offered on a common carrier basis over the existing narrowband telephone network. Local exchange carriers have provided point-to-point private line video transport services between a program source and a distributor to broadcasters, cable television systems and television networks for many years. Some LECs currently offer, on a common carrier basis, complete video transport services to cable operators from a cable system's headend to residential customers' premises.[19] The plant used for this service generally is of the same kind and architecture as traditional cable television distribution plant. Several LECs, however, are currently providing experimental video common carrier transport services to cable operators using fiber optic transmission media to subscribers' homes.[20] Local exchange carriers are also experimenting with early forms of integrated telephone and video transport services.

**1. Video Dialtone and the Public Interest**

**12.** Video dialtone would enrich the video common carriage services that link customers to video programmers by facilitating the provision of additional non-programming services and of enhanced video gateways including detailed menus, information search capabilities, and subscriber-driven data processing. In this regard, video dialtone will provide a "platform" through which subscribers can access video and other information services. Consideration of the extensive comments filed in this and other

---

[19] This is referred to as "channel services." See 47 C.F.R. § 63.08. The Commission has granted blanket authority for LEC provision of channel service outside of the carrier's telephone service area, but such service within the carrier's service area still requires prior approval, pursuant to Section 214 of the Act. Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area, 96 FCC 2d 623 (1984).

[20] See, e.g., Indiana Bell Telephone Co., Inc., W-P-C 6630, adopted Dec. 3, 1990; Contel of California, Inc., 5 FCC Rcd 1711 (1990); General Telephone Company of California, 4 FCC Rcd 5693 (1989) remanded National Cable Television Assoc., Inc. v. FCC, 914 F.2d 285 (1990); Southern Bell Telephone Company, W-P-C 6166, adopted September 27, 1988. These trials include both fiber-to-the-curb and fiber-to-the-home architectures.

proceedings[21] has led us to tentatively conclude that the video dialtone policy will promote the Commission's goals in this proceeding by encouraging the provision of an accessible, feature-rich network that can accommodate the needs of all users. Consistent with this approach, we have decided to reexamine, in the context of video dialtone, the Commission's previous proposal to recommend to Congress the elimination of the ban on LEC involvement in video programming.[22]

**13.** a. Infrastructure Considerations. We tentatively conclude that development of an advanced cost-effective telecommunications infrastructure is likely to be achieved more quickly if we adopt a video dialtone policy. Permitting the LECs to provide video dialtone services will remove unnecessary barriers to the development and construction of broadband facilities and will offer incentives to develop and construct, operate, and promote such facilities for the general public benefit. If carriers construct the underlying broadband common carrier network used to provide enhanced services, they will have strong incentives to promote the growth and use of the network, even though in doing so they improve the capabilities of competing enhanced service providers.[23] Under the video dialtone model, LECs will be able to respond to marketplace demand for video common carriage and advanced telecommunications services in the multimedia environment by providing both the underlying video dialtone common carriage as well as their own competitive non-programming services. On this basis, we tentatively conclude that video dialtone will directly contribute to the development of a nationwide, advanced telecommunications infrastructure. We invite comments on the nature of LEC incentives and the likely infrastructure benefits and costs of proceeding with video dialtone at this time.

**14.** Local exchange carrier networks with the capability to establish switched broadband connections could potentially further our goals to an even greater degree, such as by increasing competition and information diversity. For instance, if a LEC were to build a broadband network under the video dialtone model using current technologies and architectures, it is possible that demand for system capacity would exceed supply, resulting in service suppliers being denied access to the non-discriminatory gateway. In contrast, a switched broadband network might offer virtually unlimited capacity since the number of service suppliers on the platform would not be

---

21 See, e.g., Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report in MM Docket 89-600, 5 FCC Rcd 4962 (1990); Networks of the Future, supra note 12 (testimony of Dr. Barbara O'Conner).

22 See Second Further Notice of Inquiry, infra Section V.

23 The question of whether LECs should be permitted, along with others, to provide video programming directly is a separate question and is raised below in the Second Further Notice of Inquiry, see infra Section V.

constrained by the transmission capacity of the network.[24] We seek comment on whether video dialtone regulation should impose some minimum broadband switching requirement, and the feasibility of LECs being able to implement such a requirement. There may also be significant public benefits from the development of integrated networks which enable video, voice and data to be transmitted over the same facility. We seek comment on the likely evolution of such networks and the feasibility of so proceeding. We also seek comment on the costs of constructing a system with broadband switching capability.

15. b. Marketplace Efficiency Considerations. Second, we believe that by proceeding with video dialtone, with its emphasis on robust competition among service providers, significant benefits for the public will accrue. For example, the presence of an alternative broadband network generally available on a common carrier basis, could be expected to stimulate enhanced service providers overall, and video service providers in particular, to offer new choices to consumers. By stimulating overall use of facilities, the public would secure significant efficiency benefits and prices could be expected to decline. Such a vigorous enhanced services market also would be likely to encourage service providers to offer competitive prices and develop better customer services.

16. Improved service quality and declining prices for existing video delivery services are similarly likely to follow as competitors seek to retain existing market shares and attract new viewers. Indeed, the availability of video dialtone should alleviate to some extent the current market power maintained by the cable industry, while at the same time stimulating all cable operators to offer better customer service and more competitive prices to subscribers.[25] Additionally, we believe that the video dialtone model is sufficiently flexible to allow competitors to satisfy public demand with technological innovations to the network which are impossible even to foresee today. Parties should comment on the extent to which the video dialtone regulatory framework can accommodate technological advances and the extent to which the video dialtone model is likely to produce such competitive benefits.

17. c. Diversity Considerations. Finally, among the benefits we see coming from the video dialtone model is the increase in the diversity of information sources. The video dialtone model will foster the dissemination of information by encouraging a multitude of voices that could reach every household -- the bedrock principle of the First Amendment.[26] Video dialtone

---

[24] In the context of video program distribution, a switched broadband network can offer "on demand" video services when the network can establish a one-way, point-to-point broadband connection between the central office or headend and the subscriber. If the network can establish a two-way, point-to-point broadband connection, it can also provide a videophone service.

[25] See e.g., Report in MM Docket No. 89-600, 5 FCC Rcd at 5003, 5006, 5031.

[26] Associated Press v. U.S., 326 U.S. at 20.

would offer an alternate route to the American household for program producers and program packagers who now must largely depend upon television broadcast stations and cable television systems to reach their markets. Each of these systems is free to treat program suppliers differently based upon the content of their services. Numerous commenters have argued that by proceeding with video common carriage rather than LEC ownership of programming from the outset, a number of potential discrimination problems triggered by LEC involvement in the selection and ownership of video programming will be avoided.[27] Further, some commenters have stated that, if permitted to do so, they would provide video programming in the manner of traditional cable system operators.[28] We believe there is no public gain from merely substituting one such entity for another, and that the diversity benefits we seek are premised upon non-discriminatory access for program suppliers and consumers. Moreover, if local exchange carriers offer non-programming services under the video dialtone model, their presence as a second wireline transport provider in competition with cable systems could substantially increase information diversity. We also seek comment on whether it would be in the public interest to permit a local exchange carrier to acquire the facilities of a cable television system in the LEC's service area without obtaining a cable franchise and operate those facilities under the video dialtone regulatory structure, with its attendant nondiscrimination obligations enhancing competition among service providers.

**2. Video Dialtone and Advanced Network Design.**

**18.** There have been significant developments in technology in the past several years concerning the capabilities of advanced telecommunications networks. We believe that the video dialtone model will accommodate evolving technology. Advances in fiber optic and other new broadband technologies compel us to anticipate more widespread video common carriage.[29] Today, LECs

---

27 See, e.g., United Church of Christ Comments at 17-18 (filed Dec. 16, 1988); Florida Public Service Commission Comments at 4-5 (filed Dec. 16, 1988).

28 See, e.g., Pacific Telesis Comments at 2 (filed Dec. 16, 1988); Ameritech Operating Companies Reply Comments at 16 (filed Jan. 27, 1989).

29 Fundamental advances in the manufacture of microelectronic devices and fiber optic cable have led to large reductions in the cost of optical transmission systems. Optical networks can transport high bandwidth video services as well as traditional narrowband services. In addition, digital technology makes it possible to develop integrated broadband networks that combine voice, data, and video services on one cable. Moreover, advances in hardware are being followed by the development of new standards to administer how these networks will be operated. Already, the International Telephone and Telegraph Consultative Committee (CCITT) has agreed to a synchronous optical network (SONET) standard which determines the underlying transmission structure of the telephone network, and agreements may be close at hand for a B-ISDN standard which defines the required interfaces to the network. See generally B-ISDN: High Performance Transport, IEEE Communications Magazine, vol. 29, no. 9 (Sept. 1991).

generally confine their use of fiber optic transmission facilities to interoffice and feeder network applications, where sufficient traffic exists to justify the additional bandwidth relative to traditional copper cable. Over time, as optical transmission technologies mature and costs decline, we expect to see fiber optic cable deployed incrementally closer to the end user. Fiber will continue to be deployed in the feeder network until telephone companies decide to extend fiber to within a few hundred meters of the home using a "fiber to the curb" system. The final step may be to extend fiber optic cable all the way to the subscriber.[30] Despite the apparent advantages of fiber optic cable, we do not intend, however, to endorse any particular medium or network architecture. We ask that parties comment upon the impact fiber-based and other transmission technologies might have on the evolution of advanced networks.

**19.** Such broadband networks could serve as a platform through which subscribers can efficiently gain access to a broad array of telecommunications services. The history of common carriage offers a number of examples of demand stimulated by the supply of new network capabilities.[31] We tentatively conclude that under the video dialtone model, the LECs would receive the regulatory structure and incentives they need to establish a network platform that will enable entrepreneurial providers of voice, data, and video services to develop services responsive to the demands of the customers. Parties are requested to comment on the nature of services and markets that may develop as the advanced network emerges under the video dialtone model.

### 3. Authority to Implement Video Dialtone

#### a. Statutory Authority

**20.** Some parties have argued that current rules and statutes allow

---

[30] A substantial benefit of a fiber optic network is the flexibility it affords the network operator in organizing network facilities to be used for new and existing services. With fiber, the role of the network operator becomes one of bandwidth management rather than facilities management. With a traditional copper network, a request for a new telephone line requires the network operator to physically locate an unused copper wire pair to provide service. With a digital platform, the request for a new service could be accommodated through software changes without the need for facilities management in the distribution network.

[31] For example, the development of touch tone dialing and out-of-band signalling networks, designed initially to facilitate efficient interconnection of callers, precipitated introduction of custom calling features for users. In addition, the establishment of 800 and 900 service continues to provide customers with a wide range of audiotext services.

common carriers to distribute video services on a common carrier basis.[32] We tentatively agree.

21. Section 613(b)(1) of the Cable Act[33] states that it is unlawful for a common carrier subject to Title II to "provide video programming directly to subscribers in its telephone service area."[34] While the term "provide video programming directly to subscribers" is nowhere defined in the Act, a review of the legislative history evidences the Congressional concern behind the prohibition: to bar local exchange carriers from becoming cable operators in their service areas.[35] This ban was intended to ensure that LECs do not provide video programming directly to subscribers in the same manner as traditional cable operators in order to prevent the development of local media monopolies and to encourage a diversity of ownership of communications outlets.[36] Yet, some commenters contend that this prohibition restricts telephone companies from "providing" video programming by means of common carrier services.[37] Since under our proposed video dialtone model the LEC could not itself provide video programming in the manner of cable television operators, either by selecting such programming or having a financial interest in such programming, we tentatively conclude that Section 613(b) presently imposes no bar to the implementation of video dialtone.[38] We request comment on this analysis.

---

32 See, e.g., United States Telephone Association Comments at 11-12 (filed Dec. 16, 1988); NYNEX Telephone Companies Comments at 11-12 (filed Dec. 16, 1988); Contel Corporation Comments at i-iv, 35-38 (filed Dec. 16, 1988).

33 47 U.S.C. § 533(b)(1).

34 Id. While the term "video programming" is defined in the Cable Act, 47 U.S.C. § 522(16), we ask parties to address potential difficulties which may arise in the future in applying that definition as new services develop.

35 See Report of the Committee on Energy and Commerce, to accompany H.R. 4103, Cable Franchise Policy and Communications Act of 1984, H.Rep. 98-934, 98th Cong., 2d Sess. (1984) [hereinafter Cable Report] at 57. ("Section 613(b) prohibits a common carrier from selecting or providing the video programming to be offered over a cable system.")

36 Cable Report, supra note 35, at 55.

37 See, e.g., Warner Cable Communications, Inc. Comments at 2-4 (filed Dec. 16, 1988).

38 In fact, local telephone companies providing video dialtone would be fundamentally different from cable operators, who have been found to share attributes of the traditional press in their broad discretion in the selection of programming. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450-1452 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); see also Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

### b. Modification of Final Judgment

22. Under the express terms of the Modification of Final Judgment (MFJ),[39] the BOCs were prohibited from providing "information services" without a waiver from the trial court. Recently, however, the trial court, in response to an appellate court directive,[40] has lifted the ban on BOC provision of information services.[41] Thus, to the extent we would permit the BOCs to provide enhanced information services as part of video dialtone, the MFJ does not pose a bar. We note, however, the continuing applicability of the inter-LATA restriction which may restrict BOC provision of video dialtone service if separate facilities are required for each LATA.[42] We solicit comment on the way such services may develop and the applicability of this restriction to video dialtone.

## C. Implementation of Video Dialtone

23. Implementation of video dialtone could occur under more than one regulatory approach. We set forth below two such approaches. A comparison of these two approaches leads us to tentatively conclude that a "two-level gateway" regulatory structure will better achieve our goals and provide an easy-to-use, flexible framework for video dialtone. Such an approach best serves our objectives and meshes with the existing regulatory framework. It also obviates the need to draw regulatory distinctions between the distribution of video and non-video services -- distinctions that are becoming increasingly problematic as technologies converge. We invite parties to comment on this tentative conclusion and to suggest alternative ways in which video dialtone could be implemented.

---

[39] United States v. Western Electric Co., Inc., 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) ("Modification of Final Judgment" or "MFJ"). See also United States v. Western Electric Co., Inc., 900 F.2d 283 (D.C. Cir. 1990), cert. denied, MCI Communications Corp. v. United States, 111 S.Ct. 283 (1990) (Information Services Restriction Remand). For the background of the MFJ see Consolidated Application of AT&T for Authorization Under Sections 214 and 310(d) of the Act, 96 FCC 2d 18 (1983), recon. 98 FCC 2d 141 (1984).

[40] United States v. Western Electric Co., Inc., 767 F. Supp. 308 (D.D.C. 1991), appeal docketed, No. 91-5263 (D.C. Cir. Aug. 30, 1991) (stay lifted on Oct. 7, 1991, application for review denied, American Newspaper Publishers Association v. United States, 60 U.S.L.W. 3340 (Oct. 30, 1991)).

[41] Id.

[42] See United States v. Western Electric, 1989-1, Trade Cas. (CCH) ¶ 68,400, 1989 WL 21992 (D.D.C. Jan. 24, 1989) aff'd. 907 F.2d 160 (D.C. Cir. 1990), cert. denied, Bell Atlantic Corp. v. United States, 111 S.Ct. 1018 (1991).

### 1. Objectives for Implementing Video Dialtone

**24.** To further the public interest goals described above, we tentatively conclude that the implementation of video dialtone should be guided by certain core objectives. First, it is important to implement video dialtone in a way that best facilitates competition in the provision of services. Thus, access to video dialtone for video program and other service providers should be on a non-discriminatory basis. This concept of equal access will encourage competition and promote our diversity goals. If video dialtone is to provide the maximum public interest benefits, we must ensure that video dialtone does not give any provider of competitive services an unfair advantage over its competitors. Second, video dialtone should be easy for the average person to use. Just as the average consumer now can easily access an array of services through his or her telephone, we envision video dialtone as facilitating access to a similar plethora of video services. Finally, the video dialtone regulatory framework should be sufficiently flexible to accommodate new technological developments. The capabilities of telecommunications networks have been evolving, and rapid change is likely to characterize this area for decades to come. While it might serve the public interest to begin deployment of video dialtone as soon as possible, we do not want to constrain its development by today's technology. We invite parties to comment upon these fundamental objectives for implementing video dialtone and to suggest any other objectives that they believe the implementation of video dialtone should further.

### 2. Regulatory Approaches

**25.** Two-Level Approach. Under this approach, the LEC would provide video dialtone in two levels. The first level would provide an "electronic platform" or "window" that opens to a broader network, giving the user access to video and non-video communication services provided by a multiplicity of competitive service providers. Through this platform, consumers could gain access to video programs (provided by entities other than the local exchange carrier), information services, competing video and videotext gateways, videophone, and other communications services.

**26.** This first level platform would consist of basic services and services adjunct to basic services, which would be regulated under Title II of the Communications Act, and thus provided on a non-discriminatory common carrier basis.[43] The platform will give video service providers access to end-to-end transmission capabilities to provide their programming to consumers. Although local exchange carriers, rather than the Commission, will ultimately determine the precise basic features and functions they choose to offer as part of the platform, the platform is likely to include basic directory and routing functions. Directory functions might include introductory and orientation information (including tutorial and "help" functions informing consumers how to use the platform) and service provider listings that will permit users to identify and access the various competing

---

[43] As a Title II interstate service, the video dialtone platform would be a tariffed offering governed by Part 61 of our rules. 47 C.F.R. Part 61.

services accessible through video dialtone. Similarly, basic routing functions would appear necessary to enable the consumer to connect easily to the desired service provider.

**27.** On the first level, service providers would be given access to the same functionalities on the same terms and conditions. Service providers would receive the same degree of connectivity including access to non-proprietary technical standards to establish end-to-end connections. Likewise, the LEC would provide service providers with the network information necessary to enable service providers to perform billing and collection for their services. As these functions would be performed as a part of basic service, non-discrimination is required.

**28.** As a second level of video dialtone, a LEC would be permitted to provide its own advanced video gateway and related services, which would be unregulated services subject to competition from other gateways and video services using the platform. Selected by the consumer via the platform, this advanced gateway could include advanced electronic navigational aids of the gateway provider's own design. Thus, while we cannot know the exact range of such features at this early stage, a gateway provider could provide for menus and key word and subject matter search capabilities that could be tailored to an individual consumer's preferences. Such services also could include the capability to permit the consumer to preview all programs on a particular topic or at a particular time or date. Moreover, a LEC would be permitted to provide on behalf of any video service providers order processing, billing and collection, customer installations, and customer premises equipment for the unregulated video services, pursuant to existing Commission regulatory provisions. Such services could significantly enhance the ability of information service providers to serve "dial-up" customers.[44] A LEC would retain broad discretion in designing and offering second level services and features, and would be permitted to compete on an equal basis with advanced gateway providers. A LEC would not be able to provide video programming directly to subscribers as part of its advanced video dialtone services.[45]

**29.** We tentatively conclude that this two-level approach would further our core objectives in implementing video dialtone. Most importantly, it would appear to maximize the potential for the growth of competition in the distribution of video communications services (including both video programming and other video services) and of non-video services. First, it would permit competition between gateways provided over separate transport

---

[44] We use the term "dial-up" to describe customers without a preexisting contractual relationship or a dedicated link to a service provider and who decide to use that provider's services "on the spur of the moment." For example, with billing and collection services from a LEC, a video service provider could offer pay-per-view options.

[45] In the Second Further Notice of Inquiry, we are seeking comment on whether it would be in the public interest, in the context of video dialtone, to permit LECs to provide video programming directly to subscribers. See Second Further Notice of Inquiry, infra Section V.

facilities to the home, e.g., between the LEC and cable networks. Second, it would permit video gateway providers to gain access to consumers without having to build their own local distribution facilities. They could instead rely on nondiscriminatory access to the LEC network to provide their services to consumers, and thus might be able feasibly to offer a more specialized array of services. For instance, Prodigy and Compuserve today provide videotext gateway services accessible to consumers over the LEC network. Similarly, competing video gateway providers could decide that they could most economically distribute their video services to consumers over the video dialtone platform. Finally, it would permit individual video program and service providers to compete by listing on the video dialtone platform. We tentatively conclude that offering video service providers this multiplicity of options for delivering their services to consumers should unleash competitive marketplace forces, which will provide consumers with the greatest possible choice in video services at the lowest price. We request comment on this tentative conclusion.

**30.** Preliminary examination of the nature and purpose of the video dialtone platform leads us to tentatively conclude that it causes little, if any, disruption to current regulatory policies, including those longstanding policies adopted in our Computer II and Computer III dockets.[46] The platform would include basic transport and (possibly) switching services. It also would include limited computer processing applications directly related to the facilitation of the connection between the subscriber and the service provider that qualify as adjuncts to basic services.[47] We further conclude

---

[46] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (Computer II), modified on recon., 84 FCC 2d 50 (1980) (Computer II Reconsideration Order), modified on further recon., 88 FCC 2d 512 (1981) (Computer II Further Reconsideration Order), affirmed sub nom., Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); Computer III, 104 FCC 2d 958 (1986).

[47] Since the adoption of Computer II, the Commission has made clear that whether a service using computer processing technology is classified as basic or enhanced depends not upon a literal reading of the definition, but instead upon the purpose for which that technology is used. Computer II, 77 FCC 2d at 417-423; North American Telecommunications Association, Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premise Equipment, 101 FCC 2d 349, 356-361 (1985) (NATA/Centrex Order); modified on recon. 3 FCC Rcd 4385 (1986) (NATA/Centrex Reconsideration Order). If a service option or feature is clearly basic in purpose and use and brings maximum benefit to the public through its incorporation in the network, the Commission has consistently categorized that option or feature as adjunct to basic, thus making it subject to Title II regulation. NATA/Centrex Order, 101 FCC 2d at 359, para. 24. Thus, services have been categorized as "adjunct to basic" when they "facilitate the provision of basic services without altering their fundamental character." NATA/Centrex Reconsideration Order, 3 FCC Rcd at 4386. For example, speed calling, which can be

on a tentative basis that enrichments to the basic service provided on the second level, such as advanced video gateway functions offered by the LEC, (e.g., customized menus permitting program searches by subject category or time of day), properly would be classified as enhanced services.[48] We also tentatively conclude that, in the video dialtone environment, functions such as the offering of billing and collection services or the provision of customer premises equipment should retain their current regulatory status.[49]

---

characterized as involving "customer interaction with stored information" under the enhanced services definition, has been classified as adjunct to basic because its purpose is to facilitate establishment of a transmission path over which a telephone call may be completed. Computer II, 77 FCC 2d at 421. Similarly, electronic directory assistance, although it involves provision to the customer of "additional, different, or restructured information" and calls for some subscriber interaction with stored information, is adjunct to basic because this offering provides information about another subscriber's telephone number required to place a call to that other subscriber over network facilities. Southwestern Bell Telephone Co., Petition for Waiver of Section 69.4(b) of the Commission's Rules, 5 FCC Rcd 3792 (Com. Car. Bur. 1990). We tentatively conclude that the purpose of the computer processing components found in the platform would be analogous to the purpose of speed dialing or electronic white pages.

48 Section 64.702(a) provides:

> For the purpose of this subpart, the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

47 C.F.R. §64.702(a).

49 See, e.g., Detariffing of Billing and Collection Services, 102 FCC 2d 1150, recon. denied, 1 FCC Rcd 445 (1986) and Filing and Review of Open Network Architecture Plans, Phase I, 4 FCC Rcd 1, 59 & n.207 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084, 3087 & paras. 30-34 (1990) (BOC ONA Reconsideration), petitions for review pending, California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990) (LEC billing and collection services not regulated as Title II common carrier services, but subject to Commission's Title I authority as services incidental to communications); Computer II, 77 FCC 2d 384 (1980) (customer premises equipment market deregulated); Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC

Finally, we tentatively conclude that broadband transmission and switching components, if available, would be functionally indistinguishable from the narrowband transmission and switching components of today's telephone network and consequently, access to these facilities can reasonably be regulated as a traditional telecommunications common carriage.[50]

31. We also tentatively conclude that this two-level approach to video dialtone satisfies our objective of implementing video dialtone in a manner that is easy for the average consumer to use. Permitting the LEC to provide at the platform level introductory content, tutorial and help information, and directory information should make it significantly easier for end users to gain access to video service providers electing to be listed on the first level platform. Likewise, the incorporation of directory and routing functions, such as permitting a consumer to list only video or only videotext service providers, could make the video dialtone service truly functional for the subscriber. By bringing additional information sources within the ready grasp of end users, incorporation of these functions within the network would thus appear to further significantly our stated First Amendment diversity goals.

32. We seek comment generally on the two-level approach to video dialtone. In particular, we seek comment on the technical feasibility of deploying such a two-level system in the video dialtone environment as well as the type of service providers which might seek access to the video dialtone platform. We also ask parties to comment on the extent to which the two-level approach makes video dialtone service easily accessible to consumers. We solicit comment as well on our analysis that the two-level approach causes little, if any, disruption to existing regulatory policies.

33. Finally, we ask whether, in the video dialtone context, provision of such services by the local exchange carrier requires any special safeguards in order to prevent anticompetitive conduct in addition to or in

---

Rcd 143 (1987) (BOC CPE Relief Order) (removes structural separation requirements from BOCs' provision of customer premises equipment), modified on reconsideration, 3 FCC Rcd 22 (1987) (modifies and clarifies several aspects of nonstructural safeguards).

[50] LECs presently request and receive authorization under Section 214 to provide non-switched channel service. 47 U.S.C. § 214. Consistent with present non-discrimination obligations which attach to the provision of basic common carriage service, a LEC offering the basic platform would not be permitted to refuse access to programmers and advanced service providers. Further, the LEC would be required to offer rates, terms, and conditions without unreasonable discrimination to all entities wishing to take this basic offering.

place of those we conclude are applicable to enhanced services.[51] Parties are asked to make specific recommendations to the extent possible.

34. Single Advanced Gateway Approach. Under this alternative regulatory approach to implementing video dialtone, only the underlying transport and switching components, where available, would be regulated as basic common carriage under Title II. Rather than having the local exchange carriers offer certain gateway services and other non-programming functions through a basic first level platform, this approach would permit the LECs to offer a single advanced gateway through which consumers could access LEC-provided non-programming video services as well as those of other information providers. Under this approach, we anticipate that the LECs would provide, as enhanced services, such features as detailed menus, navigational aids, search capabilities, and other information designed to make the video dialtone gateway easy to use. We also envision, as with the two-level approach, the LECs would offer as non-basic services other non-programming functions, such as order processing, billing and collection, and the provision of customer premises equipment.

35. Because we seek to achieve equality of access for program suppliers using video dialtone, we seek comment on whether under the single advanced gateway approach, the Commission should require a Bell Operating Company or other local exchange carrier to offer all such users access to the enhanced gateway services under the same terms and conditions. The nature of those terms and conditions could, however, be left to the LEC's discretion. We seek comment on whether this is a case in which the Commission should exercise its ancillary jurisdiction under Section 2(a)[52] to impose such a non-discrimination requirement on the particular enhanced services.[53] We ask commenters to discuss whether the Commission should exercise such authority and if so, to identify any additional conditions they would recommend that the Commission impose. We also ask parties to explain how they would distinguish between video dialtone and other enhanced services, given the increasing convergence of technologies.

36. Other Alternatives. As we noted, video dialtone can be implemented in various ways. While we tentatively conclude that the two-level approach best serves our goals and incorporates the video dialtone objectives, we invite commenters to suggest alternative ways of implementing video dialtone. We ask that such proposals be specific and explain how our overall goals and video dialtone objectives will be furthered by the proposal.

---

[51] Appropriate safeguards for the Bell Operating Company provision of enhanced services are presently under consideration. Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 174 (1990).

[52] 47 U.S.C. § 152(a).

[53] Computer II Reconsideration Order, 84 FCC 2d at 92-93.

### 3. Revisions to Section 63.54

**37.** As we indicated in the FNOI,[54] under our rules, Note 1 following Section 63.54 of our rules might be interpreted to preclude the offering of video dialtone to the extent the note bars "any financial or business relationship whatsoever by contract or otherwise ... except only the carrier-user relationship."[55] Consequently, we propose to amend Note 1 to make explicit that relationships beyond the carrier-user relationship are permissible in the provision of video dialtone services and, for the reasons set forth in the FNOI and herein, we again tentatively conclude that the Cable Act erects no statutory barrier to our taking such action.[56]

**38.** As we discussed in detail in the FNOI, nothing in the language of the Cable Act itself suggests Congress required us to retain the language of Note 1 to Section 63.54 without change. Congress did not incorporate the language of, or refer to, Section 63.54 or Note 1 in the Cable Act. Moreover, by adopting a definition of "affiliate" for purposes of the Cable Act that is less restrictive than the standard of Note 1, we tentatively conclude that Congress provided us with discretion to modify Note 1 to adopt a standard that is less restrictive than the current Note 1 standard, so long as it does not permit affiliations beyond those permitted by the language of the Cable Act.[57]

**39.** The fact that the telephone company/cable television cross-ownership restriction was intended "to codify current FCC rules concerning the provision of video programming"[58] does not alter our tentative conclusion. Congress did not intend by this sentence to etch into stone every one of the Commission's then-existing definitional interpretations of its rules. Indeed, upon adoption of the Cable Act, the Commission had to amend the language of its rules to conform to the different language used in the Act,[59] something that would not have been permissible if the rules were codified verbatim.[60]

---

54 FNOI, 3 FCC Rcd at 5865.

55 47 C.F.R. § 63.54 n.1(a).

56 FNOI, 3 FCC Rcd at 5865-66, paras. 87-91.

57 See 47 U.S.C. § 522(1).

58 See Cable Report, supra note 35, at 56.

59 See Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, 50 FR 18637 (1985) (subsequent history omitted).

60 We also note that to the extent the legislative history is inconsistent with the language of the Cable Act, the language governs. See ACLU v. FCC, 823 F.2d 1554, 1568-69 (D.C. Cir. 1987), cert. denied, 108 S.Ct. 1220 (1988).

**40.** As set forth in Appendix B, we thus propose to amend Note 1 to add Subsection (c) making clear that the rules do not preclude local telephone companies from providing video dialtone including enhanced services, advanced video gateway functions and other related non-programming functions.

### 4. Other Rule Changes

**41.** How video dialtone will develop is uncertain. Video dialtone must have flexibility to develop in harmony with evolving technology and market demand. For this reason it would be premature to set out with specificity how all of our existing rules will impact upon video dialtone. We recognize, of course, that as video dialtone is deployed, some changes in our rules regarding accounting, cost recovery, jurisdictional separations, pricing and access charges may be appropriate. For example, it may be that specific additions to our current Part 69 rate elements may be necessary or desirable. We therefore ask commenting parties to identify issues they believe will arise as video dialtone develops that may require some regulatory response at some future time.

**42.** In this regard, we seek comment on whether any changes in Part 32, Part 64, Part 36 or Part 69 will be necessary to accommodate the proposals we are making here. Parties are encouraged to offer specific rule changes if they feel changes are necessary.[61]

## IV. First Report and Order

**43.** In this proceeding, we requested comment on the meaning of Sections 613(b) and 621 of the Cable Act. In particular, we sought comment "on whether section 613(b)(1) applies to interexchange carriers."[62] With respect to section 621(b), we sought comment on "whether a customer of tariffed video transmission services would be subject to a franchising requirement under the Cable Act" and, conversely, whether the LEC, when providing such service, would be subject to the franchise obligation of section 621(b).[63] Our intent was to make clear through interpretation of these provisions the extent of their applicability or, alternatively, to seek clarification from Congress. Having reviewed the comments and considered these issues further, we now provide the interpretive rulings set forth below.[64] We believe that these interpretive rulings will reduce

---

61 47 C.F.R. Parts 32, 64, 36 and 69.

62 FNOI, 3 FCC Rcd at 5862.

63 Id. at 5863.

64 These rules involve the agency's interpretation of specific statutory provisions in the Act, not their implementation, and, therefore, constitute "interpretive" rules, which are exempt from the notice and comment requirements of Section 553(b) of the Administrative Procedure Act. 5 U.S.C.

uncertainties with respect to the ability of telephone common carriers to proceed with deployment of video dialtone in the future and eliminate disincentives for investment in infrastructure due to ambiguity in statutory interpretation.

**A. Applicability of Section 613 to Interexchange Carriers**

**44.** Under Section 613 of the Cable Act, it is unlawful for "any common carrier, subject in whole or in part to title II of this Act, to provide video programming directly to subscribers in its telephone service area ...."[65] In the FNOI, the Commission observed that the legislative history of the Cable Act reveals no specific intent to apply the cross-ownership ban to interexchange carriers. The Commission asked whether the ban was not in fact intended to apply only to carriers with local exchange service areas. The majority of the parties addressing the issue stated that the cross-ownership ban was not intended to apply to interexchange carriers and asked that the Commission clarify the statutory meaning.[66]

**45.** Neither the language of Section 613 nor its legislative history directly address this question. The legislative history, however, does make clear that Congress intended to codify the existing cross-ownership restriction. In light of the underlying purposes of the Commission's original ban and its application by the Commission, we find that the cross ownership ban was intended to apply only to local exchange carriers, i.e., that "telephone service area" in Section 613(b) refers to local exchange service areas.

**46.** As we noted in the FNOI, the restriction on telephone common carrier involvement in video programming originated with a determination by the Commission that the monopoly position of the local exchange carrier might enable it to engage in anticompetitive conduct toward independent cable operators by denying access to LEC local exchange facilities such as its conduits and telephone poles or by improperly cross-subsidizing from monopoly services.[67] Indeed, we have consistently held that when telephone common carriers (including non-dominant interexchange carriers) do not control essential exchange facilities such as poles and conduit, the concerns about

---

§ 553(b). See, e.g., United Technologies Corporation v. U.S. Environmental Protection Agency, 821 F.2d 714 (D.C. Cir. 1987).

65 47 U.S.C. § 533(b)(1).

66 See, e.g., MCI Telecommunications Corporation Comments at 6 (filed Dec. 16, 1988); National League of Cities Comments at 59-60 (filed Dec. 16, 1988).

67 FNOI, 3 FCC Rcd at 5862-5863. See Section 214 Certificates Order, 21 FCC 2d at 324.

exclusionary conduct which underlie the rules are not implicated.[68] As such, Commission rules permitted a local exchange carrier to provide video program service in areas where it did not provide local exchange telephone service.[69] While AT&T was subject to the ban prior to divestiture, there is no indication that this was for any other reason other than its control of local exchange facilities.[70] On this basis, we conclude that the phrase "telephone service area" in section 613(b) refers to local exchange service area. Accordingly, in light of the Commission's traditional concerns, we conclude that the statutory cross-ownership ban is properly interpreted to apply only to local exchange carriers within the areas that they own or control facilities that provide exchange service.[71]

---

[68] Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area, CC Docket No. 84-28, 98 FCC 2d 354, 356 (1984) (Blanket Section 214 Order) (LECs are not subject to the ban in areas outside their local exchange areas; non-dominant interexchange carriers not affiliated with a LEC are not subject to the ban). See also Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, 50 FR 18637 (1985), recon. denied, 104 FCC 2d 386 (1986), remanded on other grounds sub. nom., ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1220 (1988) (non-wireline cellular carriers are not subject to the ban). See also Letter of Chief of Common Carrier Bureau, FCC, to Robert J. Butler, Counsel for Twixtel Technologies, Inc. (July 9, 1990).

[69] Blanket Section 214 Order, 98 FCC 2d at 356.

[70] As discussed in the FNOI, there was some concern about the ability of AT&T to cross-subsidize and otherwise act anticompetitively in the event it were to become involved in the cable television business and it was suggested the Commission consider requiring non-structural safeguards to prevent abuse. See discussion of Comments of Alabama Public Service Commission in FNOI, 3 FCC Rcd at 5862. Due to the lack of control over a local exchange facilities by AT&T, however, we conclude that it is not necessary to apply safeguards in addition to those that already apply to AT&T's provision of enhanced services.

[71] Telephone exchange service is already defined in the Act. Section 3(r) of the Act, 47 U.S.C. § 153(r), provides that:

> "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers inter-communicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

B. Franchising under Section 621

47. In the FNOI, the Commission tentatively concluded that a telephone company would be required to obtain a franchise if it itself provided cable service directly to subscribers, but questioned whether in a common carrier-based system, the Cable Act still required either the LEC or the video programmer taking the common carrier service to obtain a local cable franchise.[72]

48. In response to the FNOI, some commenters stated that a LEC providing video common carrier service should not be required to obtain a franchise.[73] They urged that the Commission clarify that neither a common carrier that provides video transmission services nor a video programmer that provides video programming over such transmission facilities is subject to the local franchise requirements of Section 621. They argue that it is contrary to the express statutory language and moreover it would be impractical and contrary to Congressional intent to require every programmer using a broadband common carrier system to obtain a franchise.

49. Other parties asserted, however, that LECs and in some circumstances, video programmers, would, or should be subject to a franchise requirement.[74] These parties generally argue that it would be unfair to free local exchange carriers or their customers from franchise requirements while leaving independent cable operators subject to such requirements. The majority of these parties assert that there is no basis in the Cable Act for stating that the LEC provider of channel service is not subject to a franchise requirement. Moreover, some parties conclude that a customer of a common carrier video transport service would also be providing "cable service" over a "cable system" and would therefore be a "cable operator" subject to the franchise requirement.[75] Other parties contend that as to customer-programmers, it is either premature or inappropriate to require a cable franchise.[76]

50. Based on our review of the Act and the legislative history, we conclude that under Section 621(b), neither the LEC providing video dialtone

---

72 FNOI, 3 FCC Rcd at 5863.

73 See, e.g., BellSouth Comments at 8-10 (filed Dec. 16, 1988).

74 See e.g., Time, Inc. Comments at 58-59 (filed Dec. 16, 1988); Times-Mirror Cable Television, Inc. Comments at 46-52 (filed Dec. 16, 1988); City of New York Comments at 17-21 (filed Dec. 16, 1988); St. Louis, Missouri Comments at 7 (filed Dec. 16, 1988); Cox Cable Reply Comments at 16-17 (filed Jan. 27, 1989). See also Comments in Continental Cable Vision in MM Docket 89-600 at 69-71 (filed March 1, 1990).

75 See e.g., Time, Inc. Comments at 58-59 (filed Dec. 16, 1988).

76 See e.g., St. Louis, Missouri Comments at 7 (filed Dec. 16, 1988); City of New York Comments at 18-21 (filed Dec. 16, 1988).

services nor its customer-programmer would be required to obtain a cable franchise in order to offer service. Under Section 621(b) of the Cable Act,[77] a "cable operator" may not "provide cable service" without a franchise. Under the video dialtone model, however, we conclude that the local telephone companies providing video dialtone services would not be providing "cable service"[78] and thus would not come within the definition of

---

[77] 47 U.S.C. § 541(b).

[78] "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." 47 U.S.C. § 522(5).

"cable operators"[79] subject to the franchise requirement of Section 621(b).[80]

**51.** To be a cable operator (and therefore to be required to obtain a cable franchise), an entity must either: (1) provide cable service over a cable system in which it owns a significant interest; or (2) otherwise control or be responsible for the management and operation of a cable

---

79 "Cable operator" is defined as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(4).

See also Section 602(6), 47 U.S.C. § 522(6) which defines a "cable system" as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems.

80 See FNOI, 3 FCC Rcd at 5863, para. 74. This interpretation of the Cable Act was presented by NTIA in MM Dkt 89-600, filed March 1, 1990 at 21.

system.[81] A LEC providing video dialtone service does not fall within this definition because the LEC itself is not providing the video programming service directly to subscribers. Rather, the LEC is simply acting as a conduit in providing broadband common carrier-based service that enables its customer/programmers to provide video programming to subscribers.[82] This interpretation is consistent with the fact that telephone companies that have constructed video distribution facilities and leased them to cable operators (i.e., provided channel services) have never been required to obtain a local cable television franchise.[83] We find nothing in the legislative history inconsistent with this interpretation.

52. We also conclude that the LECs' customer/programmers for video dialtone service are not required to obtain a local cable television franchise under Section 612(b). Because they neither own a significant interest in the telephone company broadband facilities, or control, or are responsible for the management and operation of those facilities, the customer/programmers also do not qualify as cable operators under the Cable Act definition. Since such customer/programmers are not cable operators, they are not therefore required to obtain a local cable television franchise.[84] A contrary interpretation would lead to the conclusion that the programmers who lease channels pursuant to Section 612 and the public, educational and governmental entities which are provided with cable access would have to obtain a local cable franchise.[85] We do not find any evidence

---

[81] 47 U.S.C. § 522(4).

[82] To the extent that some parties simply asserted, without analysis, that LECs providing common carrier transmission services and their customer/programmers fall within the definition of "cable operators," we reject these contentions as simply conclusory. See e.g., Time, Inc. Comments at 58 (filed Dec. 16, 1988); Cox Enterprises, Inc. Reply Comments at 18 (filed Jan. 27, 1989).

[83] The Commission has required that LECs offering "channel service" receive authorization under Section 214 of the Communications Act. General Telephone Company of California, 13 FCC 2d 448 (1968), aff'd, General Telephone Co. of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969); 47 U.S.C. § 214. Such an authorization is explicitly excluded from the definition of "franchise" under the Cable Act. See Cable Report, supra note 35, at 45.

[84] This is in contrast to the situation when a telephone company leases video distribution facilities to a cable operator for the provision of cable service. See Wisconsin Bell, Inc., To Discontinue Service on its Broadband Distribution System in Brookfield, Wisconsin, 4 FCC Rcd 2238, 2240 (Com. Car. Bur. 1989). See also NTIA Reply Comments in MM Docket 89-600 at 3-7 (filed April 2, 1990).

[85] 47 U.S.C. §§ 531-32. Some parties suggested that if a customer-programmer markets a large amount of programming on a large number or percentage of a local exchange carrier's transmission channels, then it would be performing functions similar to those performed by cable operators. They

that Congress intended such a result and there is nothing in the legislative history contrary to this interpretation of the Act.[86]

## V. Second Further Notice of Inquiry

### A. Direct Provision of Video Programming by Local Exchange Carriers

53. In the NOI and the FNOI in this proceeding, we examined the question of LEC entry into the cable television business as video programmers. Draft legislation is now pending in Congress that would authorize telephone companies to provide video programming directly to subscribers.[87] The Departments of Commerce and Justice called for similar freedom of entry last year.[88] There is also draft legislation pending, however, that takes a more restrictive approach to stimulate program and facilities investment and complement video dialtone by the LECs without authorizing unfettered entry into video programming.[89] We now consider whether, in light of these developments and in the context of our video dialtone proposal, our previous analyses concerning the risks and benefits of direct provision of video programming by the LECs warrant reexamination and whether we should recommend to Congress any changes in the statutory ban.

54. We seek comment on whether the tentative conclusion reached in the FNOI finding that the public interest would best be served by permitting telephone companies to provide video programming directly to consumers is still valid in light of the public interest benefits we believe could flow from video dialtone. For instance, we seek comment whether in light of the incentives video dialtone will create for LEC provision of advanced

---

argue that the Commission should recommend that Congress amend the Cable Act in order to address this situation. See City of New York Comments at 20-21 (filed Dec. 16, 1988). That there may be some difficult lines to be drawn does not alter our interpretation of the Cable Act in this regard.

[86] We also note that as a practical matter it would be extremely onerous for both programmers and franchising authorities to require all programmers using video dialtone facilities to obtain a local franchise, especially to the extent that video dialtone could encompass a switched broadband network with programming originating in diverse and distant locations. There is no indication Congress intended such a result.

[87] See Telecommuting Infrastructure Act of 1991, S. 661, 102d Cong., 1st Sess. (1991).

[88] See letter dated March 13, 1991 from James F. Rill, Assistant Attorney General, Antitrust Division, Department of Justice and Robert A. Mosbacher, Secretary of Commerce, to Hon. Ernest F. Hollings, Chairman, Committee on Commerce, Science and Transportation, United States Senate.

[89] Communications Competitiveness and Infrastructure Act of 1991, S. 1200, H.R. 2546, 102d Cong., 1st Sess. (1991) [hereinafter Communications Competitiveness Bill].

telecommunications services, it is desirable to permit LECs to provide video programming directly to subscribers in order to significantly further our goals. Parties should address how the goals we have identified for video dialtone might be impacted by a recommendation that Congress amend the statute to permit direct LEC provision of video programming in the video dialtone environment.

**55.** We also ask that parties identify and comment on various options for direct LEC participation in video programming. For example, would it serve the public interest to permit the local telephone companies to own a specified percentage of video programming accessible through video dialtone for a limited period of time, subject to future review? Further, would it be appropriate in light of our goals to permit telephone companies to have a limited interest in video programming offered through the video dialtone?[90] Parties should state the advantages and disadvantages of proceeding according to these proposals, with special emphasis on the risks and benefits, including any likelihood of anticompetitive conduct and the incentives for accelerated infrastructure development by LECs. We also encourage suggestions for other approaches to the issue of LEC involvement in video programming.

**56.** We also ask parties proposing that telephone companies be permitted to have an interest in video programming to address whether special safeguards would be necessary to protect against cross subsidization. For example, would separate subsidiaries for programming be necessary in order to effectively reduce such risks?

### B. Investment Incentives

**57.** For the reasons stated above, we have tentatively concluded that the public interest will be best served by implementation of video dialtone service. We are concerned, however, whether our regulatory incentives will, in fact, support the policy direction enunciated herein. Some commenters have stated that some of our rules and regulatory policies may thwart, rather than encourage, the development of the infrastructure on which video dialtone service will be built.[91] For instance, some argue that our depreciation policies create little incentive for local telephone companies to retire existing copper plant and switches and to replace those facilities with fiber optic cable. Without such a fiber base, they contend, we will never have a broadband "highway to the home" and Americans will suffer as we lag behind other nations.[92] However, with digital compression and perhaps other unforeseen technologies, it may not be necessary to replace copper with fiber on an accelerated basis in order to deliver video services

---

90 Id. § 301.

91 See, e.g., NYNEX Telephone System Companies Comments at 7-10 (filed Dec. 16, 1988).

92 See, e.g., Communications Competitiveness Bill, supra note 89.

over local telephone networks.[93] We solicit comment on the extent to which our policies and rules do in fact discourage investment in advanced technology and whether changes to our rules are necessary to promote our stated goals. Parties are also asked to submit information regarding the costs of constructing broadband networks, taking into account, of course, the evolving technology.

58. We additionally seek comment on whether the public interest would be served by encouraging cooperative investment in and construction of broadband facilities by telephone companies and cable operators whether or not LECs are permitted to provide video programming directly to subscribers. In particular, should the FCC recommend legislative changes in this regard, perhaps in existing tax laws to encourage such joint ventures? For instance, should cable companies be permitted to own a percentage of the underlying video dialtone facilities so that they would be able to reap any tax benefits that attach with ownership? On the other hand, would it be in the public interest to maintain restrictions on such relationships? Further, parties should address whether we should recommend special tax credits for deployment of fiber optic cable or other facilities which allow broadband transmission or whether there should be separate depreciation schedules applicable to deployment of video dialtone. We specifically ask that parties comment on the extent to which the benefits of joint ventures between cable and telephone companies may be outweighed by the increased risk of anticompetitive conduct by those entities and by the reduction of competitive pressures that could result from such relationships. We also ask that any changes which may be desirable be specifically set forth.

## VI. Conclusion

59. For the reasons stated above, we tentatively conclude that facilitating the provision of video dialtone by local exchange carriers as a foundation for the provision of advanced telecommunications services is the best public policy at this time. We believe that this policy will remove unnecessary barriers to, and provide incentives for, telephone company construction of modern telecommunications networks that could support the telecommunications services of the future, stimulate robust competition in the video and non-video communications markets and vigorously promote the diversity goals of the First Amendment. We also conclude that section 613 of the Cable Act applies only to local exchange carriers and that section 621 of the Cable Act does not require that either local exchange carriers or their customer-programmers obtain a local franchise to provide video dialtone. We additionally seek comment on whether LECs should be allowed to directly provide video programming and on whether a recommendation to Congress in this regard is desirable.

## VII. Ex Parte Presentations

60. This is a nonrestricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine

---

93 See note 11 supra.

Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

## VIII. Initial Regulatory Flexibility Analysis

**61.** Reason for Action: The Commission is issuing this Further Notice of Proposed Rule Making to consider the adoption of rules which would enable local exchange carriers to offer video dialtone. Allowing local exchange carriers to provide video dialtone will better serve the public interest than the current rules.

**62.** Objectives: The objective of this Further Notice of Proposed Rule Making is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

**63.** Legal Basis: This Further Notice of Proposed Rule Making is adopted pursuant to Sections 1, 4, 201-205, 215, 218, 220, 303(r) of the Communications Act of 1934, as amended, and Sections 601, 612 and 613 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 220, 303(r), 521, 532 and 533; and 5 U.S.C. § 553.

**64.** Description, potential impact, and number of small entities affected: Amending our rules to permit local exchange carriers to provide video dialtone may directly affect entities which are small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

**65.** Reporting, recordkeeping and other compliance requirements: Local exchange carriers may be subject to accounting and other recordkeeping requirements.

**66.** Federal rules which overlap, duplicate or conflict with the Commission's proposal: None.

**67.** Any significant alternatives minimizing impact on small entities and consistent with stated objective: The proceeding solicits comments on a variety of alternatives.

**68.** Comments are Solicited: Written comments are requested on this Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq.

## IX. Comment Filing Dates

**69.** Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 23, 1992**, and reply comments on or before **February 24, 1992**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

## X. Ordering Clauses

**70.** Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 218, 220, 303(r) and 403 of the Communications Act of 1934, as amended, and Section 601 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220, 303(r), 403 and 521; and 5 U.S.C. § 553, a SECOND FURTHER NOTICE OF INQUIRY IS HEREBY PROVIDED as explained herein.

**71.** IT IS FURTHER ORDERED that, pursuant to Sections 1, 4, 201-205, 215, 218, 220, 303(r) of the Communications Act of 1934, as amended, and Sections 601, 612 and 613 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 220, 303(r), 521, 532 and 533; and 5 U.S.C. § 553, FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY PROVIDED to amend Section 63.54 of the Commission's rules, 47 C.F.R. § 63.54, as indicated above and in Appendix B.

**72.** IT IS FURTHER ORDERED that, pursuant to Sections 1, 4, 214 and 303(r) of the Communications Act, as amended, and Sections 613 and 621 of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 151, 154, 214, 303(r), 533 and 541, the FIRST REPORT AND ORDER IS ADOPTED.

**73.** IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX A: PARTIES FILING COMMENTS

Comments

Adelphia Communications Corporation, et al.
Alabama Public Service Commission
Alliance of Independent Telephone Companies
Alltel Corporation
American Newspaper Publishers Association
American Telephone and Telegraph Company
Ameritech Operating Companies
Arizona Corporation Commission
Arkansas Public Service Commission
Association of Cable Television Subscribers
Association of Independent Television Stations
Association of National Advertisers
Bell Atlantic Telephone Companies
BellSouth Corporation
Berkshire Telephone Corporation
Blade Communications
Booth American Company, et al.
Cable Television Operators and Associations
Cablevision Industries Corporation, et al.
Cablevision Systems Corporation
California Cable Television Association
Centel Corporation
Cincinnati Bell Telephone Company
Citizens for a Sound Economy Foundation
City of Boston
City of Lee's Summit
City of New York
City of Santa Ana
City of St. Louis
City of Sunnyvale
City of Thousand Oaks
Clifton Forge-Waynesboro Telephone Company
Colony Communications, Inc.
Communications Media Committee for the City Club of New York
Community Antenna Television Association
Connecticut Cable Television Association
Connecticut Office of Consumer Counsel
Consumer Federation of America
Contel Corporation
Continental Cablevision, Inc., et al.
Corning Glass Works
Cox Enterprises
Fidelity Telephone Company
Florida Public Service Commission
Georgia Public Service Commission
GTE Telephone Companies
Guam Telephone Authority

Heritage Communications, Inc.
Huxley Cooperative
Illinois Commerce Commission
Illinois Consolidated Telephone Company
Iowa State Utilities Board
Iowa Telephone Association
James Valley Cooperative Telephone Company
Kansas Telecommunications Association
Kentucky Cable Television Association
Kentucky Telephone Association
Klein, Paul
Louisiana Telephone Association
Mankato/North Mankato Cable Communications Advisory Board
Marshall Cable TV Commission
Maryland People's Counsel
Massachusetts Community Antenna Television Commission
MCI Telecommunications Corporation
Media Access Project
Miami Valley Cable Council
Michigan Cable Television Association
Michigan Public Service Commission Staff
Missouri Public Service Commission
Missouri Telephone Association
Mondovi Telephone Company
National Association of Broadcasters
National Association of Public Television Stations
National Association of Regulatory Utility Commissioners
National Cable Television Association, Inc.
National Federation of Local Cable Programmers
National League of Cities
National Telephone Cooperative Association
Nebraska Telephone Association
New England Cable Television
New Jersey Board of Public Utilities
New York
New York State Cable Television Association
New York State Commission on Cable Television
New York State Department of Public Service
New York State Telephone Association
NYNEX Telephone Companies
North Carolina CATV Association
Northeast Florida Telephone Company, Inc.
Northwestern Indiana Telephone Company
Ogden Telephone Authority
Oregon Cable Television Association
Oregon Independent Telephone Association
Organization for the Protection and Advancement of Small Telephone Companies
Pacific Telesis Group, et al.
Peoples Mutual Telephone Company
Pinnacles Telephone Company
Public Commission of the District of Columbia
Public Utilities Commission of Ohio

Public Utilities Commission of the State of California
Rochester Telephone Corporation
San Marcos Telephone Company
Shenandoah Telephone Company
Sherburne/Wright County Cable Communications Commission
Sirbu, Marvin A. and David P. Reed
South Washington County Cable Communications Commission
Southern New England Telephone Company
Southwestern Bell Corporation
Sugar Land Telephone Company
Tele-Communications, Inc.
Telelogic, Inc.
Telephone & Data Systems, Inc.
Teleport Communications Group
Texas Statewide Telephone Cooperative, Inc.
Times Mirror Cable Television, Inc.
Time, Inc.
Times Cable Television, Inc.
Town of Lexington, Massachusetts
United Church of Christ
United States Telephone Association
United Telephone System Companies
U.S. West, Inc.
Viacom International Inc.
Village of Schiller Park
Virginia Telephone Association
Walt Disney Company, et al.
Warner Cable Communications, Inc.
Warner Communications Inc.
Warwick Valley Telephone Company
Western Communications, Inc.
Western Iowa Telephone Association
Wilkes Telephone & Electric Company
Winnebago Cooperative Telephone Association
Wisconsin Telephone Cooperative Association

**Reply Comments**

Alabama Public Service Commission
ALLTEL Corporation
Ameritech Operating Companies
Arkansas Public Service Commission
Association of Independent Television Stations, Inc.
Bell Atlantic Telephone Companies
BellSouth Corporation
Buena Vista Pictures Distribution, Inc., et al.
Cable Operators & Associations
Cable Television Operators and Associations
Cablevision Systems Corporation
California Cable Television Association
Centel Corporation
Cincinnati Bell Telephone Company

Citizens Communications Center, et al.
City of New York
Colony Communications, Inc.
Community Antenna Television Association
Connecticut Cable Television Association
Contel Corporation
Continental Cablevision, Inc., et al.
Cox Enterprises
Emery County Farmers Union Telephone Association, Inc.
Huntel Systems, Inc. & the Blair Telephone Company
GTE Telephone Companies
Illinois Consolidated Telephone Company
Land, Herman W.
Maryland People's Counsel
Maximum Service Telecasters
Michigan Cable Television Association
National Association of Regultory Utility Commissioners
National Cable Television Association, Inc.
National Telephone Cooperative Association
New Jersey Cable Television Association
Kentucky Cable Television Association
New England Cable Television Association
New York State Department of Public Service
NYNEX Telephone Companies
Pacific Bell and Nevada Bell
Pigeon Telephone Company
Omniview, Inc.
Organization for the Protection and Advancement of Small Telephone Companies
Pacific Telesis Group
Pinnacles Telephone Company
Public Utilities Commission of Ohio & the Illinois Commerce Commission
Prime Cable Limited Partnership
Southern New England Telephone Company
Southwestern Bell Corporation
Sugar Land Telephone Company, et al.
Taconic Telephone Corp., et al.
Tele-Communications, Inc.
Telephone & Data Systems, Inc.
Teleport Communications Group
Texas Statewide Telephone Cooperative, Inc.
Time, Inc.
TKR Cable Company
Tribune Broadcasting
Turner Broadcasting System
United Church of Christ
United States Catholic Conference
United States System Companies
United States Telephone Association
U.S. West, Inc.
Valley Telco Cooperative
VectorTech, Inc.
Warner Communications, Inc.

## APPENDIX B: PROPOSED RULE CHANGES

It is proposed that Part 63 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 63 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

2. Section 63.54 is amended to add:

* * * * *

Note 1(c) Nothing in this section shall be construed to prohibit the provision of video dialtone services, enhanced services related to video dialtone, advanced video gateways and other related non-programming video dialtone functions by a telephone common carrier.

STATEMENT OF
COMMISSIONER JAMES H. QUELLO

In re: Second Further Notice of Inquiry, Dkt. No. 87-266

While I support this docket, I want to make it clear that the questions raised in the Second Further Notice of Inquiry are just that...inquiry. I have not concluded, at this point, that there is any public benefit to be derived from local exchange carrier participation in programming. Nor do I now see any benefit from joint ventures between telephone carriers and cable systems. I will be very interested in reviewing the comments which address these topics.

**Separate Statement of**
**Commissioner Sherrie P. Marshall**

Re: Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58 (CC Docket No. 87-266)

I strongly support our proposal to enable local telephone companies to provide video dialtone service to cable programmers. Implemented properly, video dialtone should ensure that existing cable operators face direct, head-to-head competition in the delivery of cable services to consumers. Subscribers will enjoy the option of a perfect substitute to their current cable offerings, and more: a new array of video and information services available through the telephone company's gateway offerings.

To the extent, however, that this item can be read to elevate the rapid deployment of broadband fiber to the home to a national goal, I cannot endorse it. That crosses the line into industrial policy of the worst kind -- particularly when other, less costly technologies might meet our competitive needs over the short term. For example, advanced video compression techniques now being tested may offer a cheaper short term alternative to fiber for the provision of many video and information services. For that matter, advances in wireless communications could, in the long term, offer an alternative more cost-effective than wired networks. In my view, the choices on which, and how soon, specific infrastructure investments should be made are decisions for businessmen, not this Commission. The FCC should not be in the business of selecting, or even favoring, a particular technology or network architecture.

Indeed, given the public's less than enthusiastic response to videophone, it's not yet clear that the public actually wants to pay for any of the new multimedia gadgets now being touted as the network of the future. I, for one, will not endorse an industrial policy that might raise consumers' phone rates for services they may not want. U.S. telephone companies should be allowed to invest in upgrades to their networks on the basis of their own technical and economic considerations -- not government dictate.

Thus, I support the basic decisions we make today with respect to telco delivery of cable; I do not, however, endorse its dicta advocating a national industrial policy of rapid deployment of broadband fiber to the home.

# # #

**SEPARATE STATEMENT**
**OF**
**COMMISSIONER ANDREW C. BARRETT**

**RE: Telephone Company-Cable Television Cross-Ownership Rules (CC Docket No. 87-266)**

I support this timely inquiry into the future role telecommunication providers should play in the evolving marketplace. I am generally supportive of the primary principle underlying a "video dialtone" model as outlined in the Further Notice. Although this concept is in its infancy, I am comfortable in saying that at a minimum, I believe that a video dialtone framework requires LECs to provide video distribution facilities to program suppliers and packages on a nondiscriminatory, common carrier basis. I must assure myself, however, that the necessary safeguards will be in place to prevent LECs from discriminating against program providers that use the LEC common carrier facilities. For this reason, I strongly encourage parties to comment on whether the provision of video services, as envisioned in the Further Notice, require specific modifications or additions to the current scheme, in order to protect against discrimination or promote efficiencies in this particular marketplace. Here it is important that parties be as specific as possible as to the appropriate regulatory safeguards.

Since this market is in its infancy, and we do not know how it will actually evolve, I am not yet ready to endorse one regulatory framework over another. For this reason, I want to strongly encourage all parties to feel free to suggest alternative models that have the potential of offering video transmission capacity on a common carrier basis. Parties should not feel that they are limited to those outlined in the Further Notice (FNPRM). Any alternative proposals should be accompanied by a discussion of specific safeguards that would be needed in order to prevent discrimination against competitors and cost shifting that could harm ratepayers.

This item includes an Order that concludes that under present law, neither the LEC providing video dialtone services nor its customer-programer would be required to obtain a municipal franchise in order to offer service. As a general policy, I may agree that it is not in the public's best interest to require a LEC or enhanced service provider to obtain a municipal franchise. However, the fact remains that, as a cable policy matter, the cable provider could be disadvantaged under such a regime. This policy issue probably will need to be addressed again at some point.

Also, certain aspects of this item make legal interpretations of the Commission's ability to authorize common carrier video dialtone services under its rules and the Cable Act. In general, I am comfortable supporting the issues raised in our Further Notice regarding the ability to amend note 1 of 47 C.F.R. 63.54 in our rules. I look forward to reviewing comments that both support and challenge our interpretation of this aspect of the Commission's rules. I also support our interpretive analysis of Section 613 of the Cable Act as it pertains to interexchange carriers. Aside from the strict legal analysis of this section of the Act, however, I also am mindful of the potential policy implications that may arise within state jurisdictions, as well as with respect to the possible need for additional safeguards. In our 1988 Further Notice of Inquiry, we raised the question of whether additional safeguards could be necessary. I remain concerned that we monitor the need to address this issue from a policy perspective in the years ahead. Finally, I believe our interpretation of the franchising requirement under Section 621 of the Cable Act can be supported by the legal analysis in the item. However, I remain aware of the serious policy implications raised by this interpretation. Some states and local franchise authorities, in particular, are likely to be concerned by this ruling. Cable companies also are likely to oppose this interpretation. Given the complexities of our modern information society, and the continual merging of technology applications for various purposes, I remain aware of the need to resolve difficult issues such as this. On balance, I believe this aspect of the First Order presents a close call, but addresses an issue that must be resolved.

Given the potential impact of this item on cable authorities in states and municipalities alike, I invite their insights on the issues raised in this item. I also would hope that commenters in this comprehensive proceeding address the many issues outlined in this item.

Separate Statement
of
Commissioner Ervin S. Duggan

Re: Telephone Company -- Cable Television Cross-Ownership Rules, Sections 63.54-63.58

I vote with my fellow Commissioners to adopt this item, which calls for comment on a proposal for telephone company-provided "video dialtone," because I see no harm in asking questions about the video dialtone concept. I look forward to hearing from interested parties, including program producers, on the item's proposed conception of video dialtone.

I am disturbed, however, about going forward at this early stage with such a definitive model of how video gateways ought to be designed and provided. The technology may not even exist today to provide the kind of video dialtone that the item contemplates. If and when it does arrive, it may be in a form we would not recognize today. For regulators to promote a particular form of network design is at best unnecessary. At its worst, it smacks of industrial policy, or of policymaking by the method of Procrustes' bed, in which he hacked off the inconvenient limbs of guests who did not fit the bed.

Will demand materialize--- soon enough and seriously enough--- for the advanced broadband network needed to support a video dialtone approach? Does this proposal reflect actual demand for new services or is it driven by mere desire? What services will be possible over a broadband video dialtone network? What will those services cost?

We vote this proposal without knowing the answers to these questions. The well-being of consumers and the public interest should be the touchstones of our decisionmaking--- not utopian enthusiasms. If consumers do not need or want to pay for the services that new technology brings, then we have no business promoting that technology.

For all these reasons, I have often described myself as a skeptic about such proposals--- albeit a friendly skeptic. I believe myself to be friendly toward technology and the future. I believe that many new technologies hold real promise for delivering more information and entertainment to more people from more sources. But no one--- no one--- can predict how those technologies will develop: which services will sell, which will fail. The brave new video world will evolve, I'm sure, in ways that surpass our wildest imaginings. But will it do so in ways that conform to our imaginings? That is precisely what causes my

disquiet about this proceeding. It seems to me too intent upon shaping what must be allowed to evolve.

Why vote in favor, then? Because I believe that the Commission has an obligation to ask one question again and again: are there unnecessary regulatory barriers standing in the way of a desirable future? If the "carrier-user" relationship set out in note 1 to the cross-ownership rules is indeed too cramping, then we should consider how better to define the permissible relationship between LECs and video programmers. On the other hand, if the current framework provides sufficient flexibility, there is no need to move to a more complex regulatory structure to accomplish our public interest goals.

I vote for this item, despite serious misgivings, for another reason. I am interested in the concept of maximizing the diversity of voices through common carrier access to programming sources. Here I want to sound a warning: If we are serious about this notion of video dialtone, we must not hobble our own steps toward the goal of real diversity by failing to create appropriate safeguards. The two-level video dialtone model proposed in this item does not include safeguards against discrimination at the second level. If telephone companies are allowed to provide highly sophisticated and customized navigational functions to programmers on an unregulated basis, can we truly guarantee equal access among those programmers?

Genuine common carriage is the essence of nondiscrimination. That nondiscrimination could be assured if telephone companies were limited to providing regulated video access services--- for example, the basic and adjunct-to-basic services identified on level one of the two-level model. It is also important, in my judgment, to separate control over content from control over the conduit if we hope to be faithful to the goal of diversity. It would be easier to ensure nondiscrimination by the owner of the wire if that owner is not in the business of providing content. I think it wise to consider maintaining a dividing line between content and conduit, then--- at least until a video dialtone system is firmly in place.

Along with its futuristic promise, the prospect of an all-fiber switched broadband network raises the possibility of one pipeline into the home, carrying all of the homeowner's electronic services---voice, data, and video. Efficient? Yes. Powerful? Yes. Filled with unsettling portents? Yes, again. Having a single wire into each home, if that occurs, would be not unlike having only one printing press. We must do everything possible, therefore, to ensure diversity in what is carried over that wire. The video dialtone model may well serve as that insurance policy. But can it be done? And can it be done with the right safeguards?

I would prefer to have voted today for a more tentative, less conclusory item: to keep our hands off the hammer and spend more time on the drawing of a blueprint. That was not possible, however. This proceeding, with all its flaws and uncertainties, has at least the virtue of posing questions that can now be tested under the assault of the political and economic marketplace.

####

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

FCC 91-336
38279

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| | ) | |
| Evaluation of the Syndication and Financial Interest Rules | ) | MM Docket No. 90-162 |
| | ) | |

## MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1991 ; Released: November 22, 1991

By the Commission: Chairman Sikes dissenting and issuing a statement; Commissioner Quello dissenting to the overall result concurring in part and issuing a statement; Commissioner Marshall issuing a statement.

## Table of Contents


Paragraph

I. Introduction . . . . . 1

II. General Policy Concerns . . . . . 7

III. In-House Productions . . . . . 12

Limit on Network Scheduling of In-House Productions . . . . . 13
Subcap on Non-Series Programs . . . . . 18
Definition of "Co-Production" . . . . . 21
Definition of "Foreign Production Entity" . . . . . 24

IV. Financial Interests . . . . . 26

Phased Negotiation Process . . . . . 27
Multiple-Project Arrangements . . . . . 34
Financial Interests in Non-Series Programs . . . . . 37
Domestic Co-Production Safeguards . . . . . 40
Domestic Co-Production "Script Freeze" . . . . . 46

V. Off-Network Syndication . . . . . 50

A. Domestic Syndication . . . . . 50

Active Syndication by Networks . . . . . 51
Active Syndication of "Off-Other-Network" Programs . . . . . 59
Affiliate Favoritism Presumption . . . . . 62
Anti-Warehousing Rule . . . . . 65

"Independent Syndicator" Definition . . . . . 67

B. Foreign Syndication . . . . . 70

Foreign Syndication of Off-Network Programs . . . . . 71
Foreign Syndication of First-Run Programs . . . . . 73

VI. First-Run Syndication . . . . . 75

Prohibition on First-Run Syndication . . . . . 76
Clarification of the Syndication Rule . . . . . 82

VII. Prime Time Access Rule . . . . . 85

Definition of Programming "from a national network" . . . . . 86

VIII. Transition Rules . . . . . 89

Grandfathering of Syndication Rights . . . . . 90
Programs Covered by Grandfathering . . . . . 94
Application of Safeguards to Grandfathered Programs . . . . . 97

IX. Reporting Requirements . . . . . 99

Certification and Reporting Requirements . . . . . .100

X. Review of Residual Rules . . . . . .105

XI. Administrative Matters . . . . . .108

Appendices

Appendix A -- List of Parties
Appendix B -- Rules

## I. Introduction

1. By this Memorandum Opinion and Order, we address issues raised in petitions for reconsideration of the Report and Order in this proceeding amending the financial interest and syndication rules.[1] The Commission's previous action provided new business opportunities for the broadcast television networks by substantially relaxing the restrictions on the networks' ability to acquire financial interests and syndication rights in television programming. The remaining financial interest and syndication rules apply only to network production, acquisition and syndication of network prime time entertainment programs and to network participation in first-run syndication. Petitions for reconsideration of the Report and Order were filed by: Association of Independent Television Stations, Inc. (INTV); CBS Inc. and

---

[1] Report and Order in MM Docket No. 90-162, 6 FCC Rcd 3094 (1991).

National Broadcasting Company, Inc. (CBS/NBC); Coalition to Preserve the Financial Interest and Syndication Rule (Coalition); Chris-Craft/United Television Station Group, Tribune Broadcasting Company, Gaylord Broadcasting Company and Channel 50 TV Corp. (Chris-Craft/Tribune et al.); Orbis Communications Inc. (Orbis); the Program Producers and Distributors Committee (PPDC); and Press Television Corporation (Press).[2]

2. The former financial interest and syndication rules prohibited television networks from acquiring any financial interests in the broadcast of outside produced programs (i.e., programs not solely produced by the network) other than the right to exhibit such programs on the network.[3] Those rules also prohibited networks from engaging in the domestic syndication business, or from having any ongoing interest in the syndication of programs for non-network broadcast distribution. However, the rules allowed networks to syndicate outside the United States programs that they had solely produced or that had been produced by foreign entities.[4]

3. The Commission adopted these rules in 1970 in response to the three major broadcast television networks' excessive power in the financing, development and syndication of television programming. The former financial interest and syndication rules were thus primarily designed to promote two specific public interest goals: (1) an increase in diversity and competition in program supply for the public's network television viewing; and (2) the creation of a diverse and competitive syndication marketplace for the benefit of local stations and their viewers. The prohibition on acquiring financial interests and syndication rights was intended to prevent networks from using their dominant position in the marketplace to "extract" such rights in programs produced by others as a condition of airing the programs. These rules also eliminated the potential conflict of interest in which networks could make programming decisions that favored programs in which they held financial interests and syndication rights.[5] The prohibition on active domestic syndication by the networks was intended to prevent them from adversely affecting competition in the syndication marketplace by favoring their affiliates in sales of such programming. By favoring their affiliates, the networks could harm both independent stations competing for syndicated product

---

[2] Appendix A lists the parties filing in this proceeding.

[3] Report and Order in Docket 12782, 23 FCC 2d 394 (1970).

[4] The financial interest and syndication rules were reinforced by consent decrees which ABC, CBS and NBC entered into with the Department of Justice after they were charged with violating the Sherman Act. These consent decrees incorporated the terms of the Commission's financial interest and syndication rules and placed additional restrictions, including a four year limit on option terms, on network behavior. See United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D.Cal. 1978); United States v. CBS Inc., 45 Fed. Reg. 34,463 (1980); United States v. American Broadcasting Cos., 45 Fed. Reg. 58,441 (1980).

[5] Report and Order in Docket 12782 at 397-8.

and other syndicators that do not enjoy a network-affiliate relationship.[6]

4. We initiated this proceeding to determine whether modification of these rules was warranted.[7] As we observed in the Report and Order, over the last 20 years, the role and the power of the three major networks has diminished; cable television has emerged as a competitive force; and the fundamental objectives of the rules -- to foster a robust syndication industry and to prevent network extraction of rights from non-network producers -- have been advanced. Concerns still remain, however, that the underlying objectives of the rules could not be achieved in the absence of such rules. In this proceeding, the Commission determined that a measured approach to relief for the networks was the most effective means of achieving our objectives and ensuring that our diversity goals were not undermined. We noted that relaxing the restrictions on network acquisition of financial interests and syndication rights would provide existing and emerging broadcast networks the opportunity and flexibility to compete in and thus generate additional revenue from the domestic and international video marketplace. Yet, we also found that there is a strong public interest in maintaining diverse sources of network programming, off-network syndicated programming and first-run syndicated programming for local broadcast stations. Thus, in the Report and Order, we concluded that the rules could be relaxed to provide the networks with greater opportunities in program production and syndication, while maintaining diverse sources of programs for networks and local independent and affiliate television stations.[8] We determined that, to achieve this balance, the new rules must include certain structural and behavioral safeguards to ensure that the networks: (1) do not extract financial interests and syndication rights from non-network producers in return for access to their schedules; nor (2) engage in anti-competitive behavior that would deprive local broadcast stations of syndicated programming.

5. Accordingly, by the Report and Order in this proceeding, we adopted new rules that: (1) eliminate the restrictions on network ownership and syndication of network programming as to all dayparts, and all programs other than prime time entertainment; (2) allow networks to retain all rights, including financial interests and domestic and foreign syndication rights, in all "in-house" productions of network programs; (3) permit networks to produce "in-house" up to 40 percent of their prime time entertainment schedules; (4) allow networks to acquire all rights, including financial interest, domestic syndication and foreign syndication rights, in outside productions, on their own or another network, subject to certain safeguards; (5) allow networks to engage in domestic syndication of all "in-house" productions aired on their network, subject to certain safeguards; (6) allow networks to engage in foreign syndication of network programs without limitations; and (7) allow

---

[6] Id. at 382.

[7] See Notice of Proposed Rulemaking in MM Docket No. 90-162, 5 FCC Rcd 1815 (1990); Further Notice of Proposed Rulemaking in MM Docket No. 90-162, 5 FCC Rcd 6463 (1990); Order in MM Docket No. 90-162, 56 FR 11720 (1991). See also Report and Order at 3097-3098.

[8] Report and Order at 3098-3099.

limited network participation in first-run syndication. The Report and Order also revised the definition of "network", established transitional rules for a "new" network and imposed certain reporting requirements.

6. On reconsideration, parties propose conflicting modifications to our new rules that would either expand or contract their scope. After carefully reviewing all petitions for reconsideration, we find no new evidence warranting fundamental changes in the rules as adopted. The reconsideration petitions in many respects repeat points already presented and considered in earlier phases of this proceeding. Thus, by this Memorandum Opinion and Order, we deny most of these requests that largely reiterate arguments already considered and rejected in our adoption of the original Report and Order. We do, however, make technical corrections to our rule regarding the co-production "cooling-off" period and the continued restrictions on network participation in first-run syndication. We also clarify our rules with respect to the definition of a co-production, the distinction between a domestic and foreign production entity, and the application of syndication safeguards to a new network.

## II. General Policy Concerns

7. In their petitions for reconsideration, the parties begin by reiterating their basic positions as to whether there is a need for restrictions on network acquisition of financial interests and syndication rights. The networks reargue their view that the financial interest and syndication rules are no longer needed in light of the changes in the video marketplace in the 20 years since they were first adopted.[9] With specific regard to the revised rules we have adopted, the networks argue that these rules impose unwarranted restraints on their ability to produce, acquire and distribute television programming, are not supported by the weight of the record, are inconsistent with our stated regulatory objectives, exceed our statutory jurisdiction, impermissibly infringe upon the First Amendment rights of the three networks, and unlawfully discriminate in favor of the Fox television network and other broadcast and cable competitors.

8. The Coalition states again that retention of the financial interest and syndication rules would best serve the public interest and questions our decision to relax the rules.[10] The Coalition also is concerned that the safeguards adopted in our Report and Order are insufficient to prevent the networks from abusing their power to the detriment of producers, syndicators, independent stations and, ultimately, the viewing public who benefits from diversity and competition.[11]

9. Moreover, the Coalition states that regulation of network conduct is

---

9 CBS/NBC Petition at 2-4; CBS/NBC Reply at 1-4; Fox Opposition at 5-6.

10 Coalition Petition at 2.

11 Report and Order at 3100.

consistent with the Constitution and that a federal district court has determined that the restrictions governing the networks' ability to acquire financial interests and syndication rights do not even implicate the First Amendment.[12] In this regard, INTV and Chris-Craft/Tribune et al. state that the court affirmed the much broader prohibition on network acquisition of financial interests and syndication activities in Mt. Mansfield Television v. FCC, 442 F.2d 470 (2d Cir. 1971).[13]

10. INTV and Chris-Craft/Tribune et al. also state that we have in most respects reached a rational decision which is amply supported by the extensive record in this proceeding. They remain concerned, however, that the networks have the incentive and ability to discriminate against independent stations if they are permitted to participate in the off-network and first-run syndication marketplaces.[14] PPDC supports our fundamental findings and conclusions. Its petition requests a clarification of an apparent inconsistency between the discussion of first-run syndication rights in our Report and Order and the rules promulgated in the Report and Order with respect to network participation in first-run syndication.[15] Orbis concurs with our decision to restrict the amount of programming a network may produce for its own schedule. However, it is concerned that the networks could harm independent producers if they are permitted to engage in foreign syndication of programming produced by others.[16]

11. Although petitioners express these concerns in their reconsideration pleadings, they present no new evidence that warrants reconsideration of our fundamental determination to relax substantially, but not totally repeal, the rules as set forth in our Report and Order.[17] Beyond requests for fundamental changes to the rules, the petitioners argue for modifications to, or clarification of, specific aspects of the new rules. We discuss these specific proposals below.

## III. In-House Productions

12. Rule. The new financial interest and syndication rules provide that a network may fill up to 40 percent of its prime time entertainment schedule with in-house productions.[18] An "in-house" production is a network program that is: (1) solely produced by the network; (2) co-produced by a network with

---

12 Coalition Opposition at 23-24.

13 INTV Opposition at 9; Chris-Craft/Tribune et al. Opposition at 14.

14 INTV Petition at 2; Chris-Craft/Tribune et al. Petition at iii.

15 PPDC Petition at 2.

16 Orbis Petition at 1-2.

17 See 47 CFR § 1.429(b).

18 47 CFR § 73.659(c).

a foreign producer; or (3) co-produced by a network with an outside domestic producer that initiates the arrangement.[19] A program is deemed "solely produced" by a network if the network alone owns the copyright, retains full business and production control, and has full financial responsibility for the program.[20] A "co-production" is a program in which a network and an outside entity share the copyright, business and production control, and financial responsibility.[21] The rule includes two safeguards applicable to domestic co-productions: (1) the co-production must be initiated, in writing, by the outside producer; and (2) the agreement is not binding on the outside producer until 30 days after it is executed.[22]

13. Limit on Network Scheduling of In-House Productions. INTV requests that the schedule cap on in-house productions be lowered to 25 percent or that the definition of in-house production be amended to exclude domestic co-productions.[23] INTV claims that the definition of in-house production allows the networks to syndicate a substantial amount of programming. It contends that at the 40 percent level the networks could control enough "hit" programming to harm independent stations. Moreover, INTV believes that in-house production will enable networks to retain much more control over the factors which determine the success of a program during network exhibition and in syndication.[24] It contends that its proposal would minimize the risks to independent stations while allowing networks to produce and distribute a generous amount of programming.[25]

14. In response to INTV, the networks argue that INTV overstates the extent to which independent stations rely on new, off-network syndicated programs. They state that independent stations have had great success with first-run syndicated and older off-network programs.[26] In addition, the networks believe that their participation in syndication will be very limited

---

19 Report and Order at 3116-3118.

20 47 CFR § 73.662(h).

21 47 CFR § 73.662(b).

22 47 CFR § 73.659(a)(3).

23 INTV seeks to limit off-network syndication by the networks. Although it would prefer a ban on all active syndication by a network, INTV supports either of the above-referenced alternatives. INTV Petition at 14-15.

24 INTV Petition at 16.

25 INTV Reply at 6.

26 In a joint opposition, Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc. (Joint Network) cite the record in this proceeding to support this contention. Joint Network Opposition at 14. In its reply, INTV also cites the record to demonstrate that independent stations have few substitutes for off-network programs. INTV Reply at 5.

for the near term due to the 40 percent cap and the high failure rate of new programs. Further, the networks dispute the assertion that they would be able to predict the success of in-house programs to a degree that would permit them to control a significant number of off-network hits.[27] The networks also object to INTV's alternative proposal to exclude domestic co-productions from the definition of in-house production. The networks note that parties to this proceeding urged us to permit networks and independent producers to enter into such arrangements and that our rules require such arrangements to be initiated by the producer.[28] The networks believe that INTV's proposal would harm independent producers with no attendant benefit to the public interest.

15. CBS/NBC argues further that the schedule cap is not supported by the record and violates their constitutional rights.[29] On the other hand, the Coalition contends that such restrictions on the networks are fully supported by the record and that the networks' unique position in the distribution of television programming requires regulatory safeguards to ensure the continued diversity of programming.[30] Moreover, the Coalition states that the argument that rules regulating the networks' conduct are unconstitutional has been rejected by the Commission and courts. In particular, the Coalition observes that the decision upholding the consent decree restriction on the networks' ability to acquire financial interests and syndication rights was found not to implicate the First Amendment.[31]

16. Decision. As we indicated in the Report and Order, to protect competition and diversity in the marketplace while also encouraging greater network participation in domestic syndication, we decided to adopt a measured regulatory response intended to (1) ensure outside producers an opportunity for access to the network schedule; (2) grant the networks limited entry into domestic syndication, subject to safeguards; and (3) enable us to assess the actual impact of that entry, and the effectiveness of both our co-production and our syndication safeguards, when we revisit our revised rules in four years.[32] In the Report and Order, we considered an earlier proposal to adopt a 25 percent limit on network scheduling of in-house productions and determined that such a low threshold was unwarranted.[33] We concluded that a 40 percent limit on network scheduling of in-house productions strikes an appropriate balance between granting the networks flexibility in choosing their schedules

---

27 Joint Network Opposition at 15.

28 Report and Order at 3119, n. 78.

29 CBS/NBC Petition at 12.

30 Coalition Petition at 4-5; Coalition Opposition at 8-10.

31 United States v. National Broadcasting Co., 449 F.Supp. 1127, 1139-40 (C.D. Cal 1978).

32 Report and Order at 3134.

33 Report and Order at 3122.

and a meaningful opportunity to actively syndicate programs, on the one hand, and, on the other hand, promoting program diversity and competition by ensuring that the networks cannot dominate the marketplace for either network or syndicated programming.[34] We determined that a network's ability to predict which program series will enjoy syndication success is not so certain as to mandate a significantly lower cap.[35] In their petitions for reconsideration, commenters provide us with no new or compelling reason to change this decision.

17. We again reject the networks' argument that a cap on network scheduling of in-house productions is unsupported by the record and violative of their constitutional rights.[36] In the Report and Order, we found that a schedule cap on in-house productions would serve as a check on network circumvention of our outside production safeguards and permit us time to assess the actual impact of limited network involvement in the marketplace.[37] In addition, we concluded that, even if a schedule cap implicated First Amendment concerns, our 40 percent in-house cap passes constitutional muster because of its primary purpose to prevent possible anti-competitive abuses by the networks in the syndication marketplace.[38] Further, we believe that the schedule cap will promote diversity of viewpoints on network television -- a goal that the courts have expressly ruled to be consistent with the First Amendment.[39]

18. Subcap on Non-Series Programs. The Coalition seeks reconsideration of the decision not to adopt a subcap on the amount of "one shot" programs (i.e., made-for-TV movies, mini-series or specials) that the networks may produce in-house. The Coalition recommends a 25 percent subcap to prevent the networks from producing all such programming in-house. It states that the small producers currently creating the majority of these programs are in precarious financial positions that make them particularly vulnerable to network abuse.[40] The Coalition believes that, if the networks can produce in-house an unlimited amount of this programming, these small producers will likely be forced out of business or into network employment and a loss of program diversity will ensue.

---

34 Report and Order at 3122-3.

35 Report and Order at 3124.

36 As stated in the Report and Order, while this cap limits the ability of a network to fill its own prime time entertainment schedule with in-house productions, it does not limit the amount of in-house productions in which a network may engage. Report and Order at 3123, n. 94.

37 Report and Order at 3121.

38 Report and Order at 3123-3124.

39 Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

40 According to the Coalition, these programs are now produced by a diverse group with only 14 percent of these programs produced by MPAA companies. Coalition Petition at 6; Coalition Reply at 4.

19. The networks argue that a 25 percent subcap on network-produced "one shot" programs is unnecessary. They state that competition among buyers of television movies and mini-series is the greatest among categories of prime time entertainment programming.[41] In particular, the networks state that cable networks now spend the same amount as the broadcast networks on these programs and air approximately the same number.[42] According to the networks, the competition from other available buyers will preclude any attempted network extraction from producers of "one shot" programs, particularly movies.

20. Decision. In the Report and Order, we rejected as unnecessary the Coalition's proposal for a separate limit on the amount of non-series programming produced in-house.[43] We found that the 40 percent limit on in-house productions adequately addresses our concerns for program diversity and minimizes our restriction on network flexibility.[44] The Coalition presents no new evidence that would lead us to alter this conclusion.

21. Definition of "Co-Production". CBS/NBC asks that the definition of a co-production, Section 73.662(b), be amended to encompass arrangements where not all, but one or more, of the enumerated factors -- copyright ownership, financial responsibility, and business and production control -- are shared.[45] Chris-Craft/Tribune et al. oppose this request, arguing that we intended to specify which of several aspects of program ownership and control must be shared for a program to qualify as a co-production. They contend that the listed factors are not intended to be a menu from which the networks may pick and choose. Chris-Craft/Tribune et al. state that we did not intend, for example, to consider a program a co-production if the copyright were entirely owned by the producer, the producer had full financial responsibility for the program, and the network merely shared business and production control. They further state that the CBS/NBC proposal would allow the networks to convert virtually any outside-produced program into a co-production, thereby evading the domestic syndication ban on such programs.[46]

22. We are also asked by CBS/NBC to consider into which category an arrangement between a network and a producer owned in part by a network should fall. CBS/NBC states that, as now written, the definition of "domestic production entity" appears to include only production entities that are not owned even in part by a network. CBS/NBC urges that either the definition be changed to permit co-production arrangements between networks and such entities

---

41 Joint Network Opposition at 9-10.

42 Joint Network Opposition at 10-11.

43 Report and Order at 3122, n. 90.

44 Report and Order at 3122, n. 90 and 3124.

45 CBS/NBC Petition at 14, n. 36.

46 Chris-Craft/Tribune et al. Opposition at 18, n. 20.

or that the Commission indicate that we would consider such arrangements "sole productions" by a network.

23. Decision. We reaffirm our conclusion that all three enumerated factors must be shared for a program to qualify as a co-production. In the Report and Order, we indicated that the best way to decide who is the "producer" is to examine who controls the production process, who pays for that process and who owns the resulting program.[47] We also stated that each of these criteria is useful for analyzing who actually produces a program.[48] Thus, only if a network shares each of the listed factors with an outside producer does it have substantial control over, and responsibility for, that production. We concur with the concern raised by Chris-Craft/Tribune et al. that virtually any arrangement with an outside producer could be considered a co-production if we required only that some of these factors be shared. Therefore, we clarify that co-productions are only those arrangements in which a network and an outside producer share all of the following criteria of control: (1) copyright ownership; (2) financial responsibility; and (3) business and production control. Finally, it was not our intent to preclude collaborations between a network and a production company owned in part by the network. Therefore, we will clarify the definition of "domestic production entity" as set forth in Section 73.662(c) to confirm that a network's production arrangement with a producer in which it holds a non-controlling interest may be a co-production for the purposes of these rules.[49]

24. Definition of "Foreign Production Entity". Chris-Craft/Tribune et al. request that we define the term "foreign production entity" to include those production entities that are registered to do business and located only outside of the United States and that are not controlled by or under common control with U.S. production entities.[50] Chris-Craft/Tribune et al. observe that, under the existing definition, a number of Hollywood studios would qualify as foreign entities because they are "registered to do business" and "located outside the United States."[51] If those studios are considered foreign production entities, then the networks could enter into co-production arrangements with such studios unconstrained by our domestic co-production safeguards. Moreover, Chris-Craft/Tribune et al. state that U.S. entities could set up foreign affiliates to enter into co-production arrangements exempt from these safeguards. Chris-Craft/Tribune et al. claim that this was not our intent.

25. Decision. While we did not intend to create a loophole in our

---

47 Report and Order at 3118.

48 Id.

49 We also modify the definition of a program "solely produced by a network," Section 73.662(h), to reflect this clarification.

50 Chris-Craft/Tribune et al. Petition at 7-9.

51 47 CFR § 73.662(e).

definition of domestic and foreign production entities, we believe that the modification to these definitions proposed by Chris-Craft/Tribune et al. is too restrictive. We do not intend to include as a domestic producer those foreign-based production firms that have only a minimal American presence.[52] The major studios which are located within the United States, maintain their principal production headquarters in the U.S., and are registered to do business here are generally recognized to be domestic producers, even though some of these companies are now owned by foreign interests. However, foreign-owned firms whose principal production headquarters are indeed outside the United States will be considered "foreign production entities" for purposes of these rules. In addition, we did not intend to permit a U.S. producer with its principal production facilities headquartered in the United States to set up a foreign affiliate in order to avoid the restrictions on domestic co-production arrangements. Accordingly, we modify Section 73.662 (c) and (e) of our rules to reflect these clarifications.

## IV. Financial Interests

26. Rule. Apart from prime time entertainment programming,[53] a broadcast television network may hold or acquire a continuing financial interest[54] in any network television programming without restriction under the new rule.[55] As for network prime time entertainment programs, a network may retain all rights in programming it produces in-house for network exhibition.[56] A network may also acquire a financial interest in any outside entertainment programming aired during its prime time schedule, subject to certain safeguards. To prevent a network from extracting such an interest as a condition of network exhibition, a network can only acquire a financial interest in an outside production for its network through a separate negotiation initiated no less than 30 days after execution of the initial network license fee agreement (and, where applicable, a pilot production agreement). When a network enters into an agreement for acquisition of any such rights in an outside production, it must certify in the public files of its owned and operated stations (O&Os) that it has complied with the rules and that its licensing or airing of the program was not conditioned on its acquisition of such rights.

---

52 Report and Order at 3117.

53 47 CFR § 73.662(d) and (g).

54 47 CFR § 73.662(a).

55 A broadcast television network can produce and retain a continuing financial interest in any programming outside prime time, any non-entertainment programming it airs in prime time, or any programming aired on non-broadcast video outlets. Report and Order at 3100, 3103.

56 The rules, however, only permit a network to hold such rights in first-run syndicated programming distributed in the U.S. that it has solely produced. 47 CFR § 73.659(b).

27. Phased Negotiation Process. CBS/NBC requests that the separated negotiation process for network acquisition of financial interest and syndication rights either be eliminated or replaced by a 30-day cooling-off period approach.[57] CBS/NBC claims that our phased negotiation requirement will undermine our goal of permitting independent program producers to obtain financing from the networks because a producer must line up financing by selling its back-end rights before it commits to supply a program at a given license fee.[58] Since the rules prevent the network from negotiating for those rights until 30 days after the producer has committed to a license fee, CBS/NBC further asserts that the networks' opportunity to compete for the back-end rights is diminished.

28. The Coalition opposes the elimination of the separate negotiation safeguard as requested by CBS/NBC. Moreover, the Coalition seeks modification of the phased negotiation process to prohibit negotiations for back-end rights[59] until after a program is scheduled.[60] The Coalition asserts that only after a program is scheduled do both parties have comparable knowledge of the program's prospects that will ensure that producers receive fair compensation for the sale of their rights in the program.[61] According to the Coalition, the networks typically negotiate license terms at the same time they negotiate for the pilot. Thirty days after this time often is still long before a network

---

[57] CBS/NBC Petition at 9-10. CBS/NBC asserts that the certification requirement is sufficient to address the concern that a network could condition the licensing of a program for network broadcast on the condition that the producer sell it back-end rights. In its opposition, the Coalition argues that certification alone is not adequate. It states that violations would be difficult to detect and could take a variety of forms. The Coalition notes that, while producers could challenge the certification, in reality a producer would have a disincentive to do so since the networks remain the major purchasers of prime time entertainment series capable of successful syndication. The Coalition points out that the network may be a producer's primary route to making profits from successful syndication of a series. Coalition Opposition at 8-10.

[58] CBS/NBC argues that while unlikely to affect large studios with alternative sources of financing, this requirement will create a barrier for small producers.

[59] Coalition uses the term "back-end rights" to include financial interests (i.e., profit participation) and syndication rights (i.e., distribution rights) or some combination thereof.

[60] Coalition Petition at 18.

[61] The Coalition notes that producers of all sizes support this safeguard because they recognize that the networks would acquire back-end rights without fair compensation if allowed to negotiate for those rights simultaneous with license fees. Coalition Opposition at 10-11.

commits to license and order a series.[62] The Coalition contends that the network is the only potential buyer of back-end rights until it commits to license and order a program.[63] It also argues that a third party will not buy an interest that thereby reduces its chances of being scheduled by a network inclined to favor in scheduling decisions those shows in which it acquires back-end rights.

29. In opposing CBS/NBC, the Coalition disputes the networks' claim that all ownership interests will be sold by the time the producers enter into the series license agreement.[64] According to the Coalition, while producers sometimes sell distribution rights in advance, they rarely sell profit participation at this stage. The Coalition believes that, given the new opportunities for the networks to act as the producers' bankers, there is no business justification for any network-imposed requirement that a producer have guaranteed financing at a point when they have agreed to order no more than a pilot. If a producer does not have the financing to produce a series, the Coalition argues, then the network can finance the program in return for back-end rights. The Coalition further observes that the networks are seeking expeditious action from the Justice Department regarding modifications to the consent decrees in order to take advantage of the new rules.[65] Thus, the Coalition argues the networks must believe that the rules will provide them with new business opportunities.

30. Decision. In adopting a phased negotiation requirement, we concluded in the Report and Order[66] that a phased negotiation is the most effective means of protecting producers against network extraction and related abuses short of retaining the complete ban on network acquisition of financial interests. Without a phased negotiation requirement, a network that has not committed to license a program could extract commitments from a producer to relinquish financial interests or distribution rights for less than a compensatory price. By separating the negotiation over the license fee from the negotiation over program rights, we limit the networks' ability to extract a producer's grant of such rights in exchange for access to the network schedule. Thus, the network will be able to obtain financial interests and/or syndication rights, but not without clearly providing additional compensation

---

[62] The Coalition explains that pilot negotiations for fall series usually take place between January and early March, but that the networks do not commit to license and order series until late May.

[63] The networks state that the development process is mischaracterized by the Coalition. The networks claim that the Coalition's proposal would result in a virtual ban on network financing of independent producers because major financing for series programs is routinely obtained prior to the point of scheduling. Joint Network Opposition at 5.

[64] Coalition Opposition at 12-13.

[65] Coalition Opposition at 12.

[66] Report and Order at 3114-3115.

(over and above the basic license fee) to the producer for such rights. The 30-day delay between the two negotiations strikes a reasonable balance in protecting producers from extraction while allowing new competition from the networks for production financing.

31. We disagree with CBS/NBC's contention that this 30-day phased negotiation process greatly diminishes their ability to compete in this area. We remain assured that networks will have a meaningful opportunity to participate in program financing through this process. Whether or not producers find potential financing sources elsewhere, they may find the prospect of a network financing bid advantageous and readily wait 30 days to finalize a deal. Thus, we continue to find that the phased negotiation requirement offers the networks a fully workable means to participate in financing outside productions.

32. We also find unwarranted the Coalition's request to preclude negotiations for back-end rights until after scheduling of the program on the network. As the networks observe, such a requirement could hamper network financing of outside productions. The 30-day period is long enough to ensure a bona fide separation in negotiations and will enable producers to seek alternative bids for the program rights from the networks if they so desire. This period is brief enough that the mere passage of time is not likely to foreclose the networks from the competition for such rights.[67]

33. Finally, CBS/NBC offers no new evidence to counter our determination in the Report and Order that its proposed 30-day "cooling-off" period safeguard would be susceptible to manipulation and abuse. We continue to believe that the 30-day phased negotiations process best accommodates our goal of allowing networks to acquire financial interests while guarding against the loss of diversity that would result from network extraction and conditioning of access. Accordingly, we reject this CBS/NBC proposal.

34. Multiple-Project Arrangements. CBS/NBC also seeks a clarification in our new rules regarding multiple-project arrangements with outside producers.[68] It proposes that such arrangements be exempt from the phased negotiation process because these deals are only made with established producers with the greatest bargaining power where network "extraction" of producer-held back-end rights is not a legitimate concern. It further argues that the phased negotiation safeguard is not workable in the multi-project context because no license fee has been negotiated at the time the network commits to finance the programs.

35. The Coalition argues that separate negotiations are workable for

---

[67] We also note that our certification process further precludes potential abuse by requiring networks to certify that their licensing or airing of a program was not conditioned on its acquisition of financial interests. Thus, we believe that, in combination, our phased negotiation and certification process is sufficient to check potential abuses.

[68] CBS/NBC Petition at 10-11.

multiple-project arrangements.[69] It explains that when a network enters into such an agreement it agrees only to pay liquidated damages if it fails to order future shows from the producer. At this stage, the network has not committed to air any individual series and no license agreements for specific series have been negotiated. The decision to license a series and the terms of that license are negotiated individually for the series after the actual proposal is made.

36. Decision. We disagree with the networks that we should exempt multiple-project arrangements with outside producers from the phased negotiation process. It may be true, as the networks contend, that these agreements are generally made with producers with relatively strong bargaining power. However, as we concluded in the Report and Order, because it is virtually impossible to tell at the outset whether a proposed program will become a "hit" -- or even be carried -- during a given season, even established producers can find themselves at a distinct disadvantage in initial licensing negotiations with a network.[70] We are also concerned that such an exemption from the phased negotiation process would be susceptible to abuse. Networks might find it in their interest to enter into ostensibly "multi-project" arrangements with producers that are later terminated after allowing the network to circumvent the phased negotiation requirement in the initial (and only) program negotiation. Furthermore, the parties retain considerable flexibility for working out their contractual arrangements within the constraints of the rules. First, an umbrella "multi-project" deal may consist of an exclusive or "right of first refusal" production arrangement in which particular license fees and back-end rights remain to be negotiated as those programs arise.[71] Alternatively, pursuant to one all-encompassing phased negotiation process, the parties may specify license fees for each of the multiple projects and then, 30 days later, agree to the financial interests and syndication rights allocations for each program at issue. For these reasons, the phased negotiation process is neither unjustified nor overly burdensome, and multi-project arrangements do not warrant an exemption from our phased negotiation requirement.

37. Financial Interests in Non-Series Programs. The Coalition urges us to prohibit the networks from acquiring back-end rights in "one shot" programs,

---

[69] Coalition Opposition at 14-15.

[70] Report and Order at 3113.

[71] As the Coalition explains, when a network enters into a multi-project agreement with a producer, it only agrees to pay liquidated damages if it fails to order a certain number of future shows from the producer. At this stage, the network has not committed to air any individual series and no license agreements for specific series have been negotiated. Decisions regarding any particular series covered by the agreement are made on a series-by-series basis after review and approval of the concept, pilot script, continuing story line and other major elements. Coalition Opposition at 15.

such as TV movies, mini-series or specials.[72] It argues that the separate negotiation safeguard is unworkable for such programs because there is no point in the production process when the parties can negotiate a financial interest separately from the license fee. It states that parties have no basis for evaluating the value of such programming because it has little domestic back-end value and its foreign value is not determined by its success on the network. Moreover, the Coalition claims that the networks are in a position to extract a financial interest without paying a fair value. It also contends that the networks could manipulate payments to producers such that they will end up with fewer back-end rights without greater network compensation.[73] The Coalition argues that these entities, which are mostly small producers, will be forced out of business and there will be a loss of program diversity.

38. The networks counter these arguments by stating that they make production commitments for and set the license fees of "one shot" programs based on a script.[74] They state that, once a producer receives a network commitment, the program can be sold in foreign syndication immediately after it is produced and in domestic syndication after its network run. Thus, the producer has all the relevant information for determining the value of the back-end rights at this point.

39. Decision. We are not persuaded that we should prohibit networks from obtaining back-end rights in non-series programs. The value derived from the non-network run of such programs is subject to much of the same uncertainty as series programs, and thus it appears appropriate to permit networks to compete for these residual rights subject to the same phased negotiation process we require for series and multi-program arrangements. In particular, this phased negotiation safeguard prevents the network from extracting back-end rights from an outside producer as a condition of licensing the program and provides the producer with an opportunity to sell these rights to other bidders after the program has been licensed for network exhibition.

40. Domestic Co-Production Safeguards. CBS/NBC requests that the safeguards for domestic co-productions, i.e., that they be initiated in writing by the outside producer and may be nullified by the producer within 30 days of execution, be eliminated. They argue that these provisions do not add anything to the safeguard against extraction already provided by the network certification requirement. CBS/NBC asserts that the safeguards will burden networks and producers with no benefit to the public interest. It states that the requirement that agreements be producer-initiated would only work in formal bargaining relationships and, since the program purchasing process is neither formal nor orderly, this safeguard will only impede communications between the parties. In addition, CBS/NBC states that a network will not want to participate in a co-production if its partner can nullify the agreement within a 30-day "cooling-off" period. CBS/NBC states that the networks will be

---

72 Coalition Petition at 8-10.

73 Id.

74 Joint Network Opposition at 10.

reluctant to enter into such agreements because, in the event that its co-producer breaks the agreement, the network would be forced to find a new outside producer, continue the project in-house or abandon the project.

41. The Coalition opposes the request for eliminating the producer-initiation requirement and "cooling-off" period safeguards.[75] It says that it finds the networks' objection curious since they are requesting a "cooling-off" period instead of the phased negotiation requirement for acquisition of financial interests. The Coalition also observes that a standard network business practice is to negotiate license agreements at the pilot stage that never come to fruition. Thus, the Coalition states that if a network does not wish to negotiate a particular co-production agreement that may be voided, it can always decide to enter into a different arrangement.

42. Chris-Craft/Tribune et al. request that the rule concerning the "cooling-off" period be modified to accurately reflect our intent to permit outside producers to nullify co-production agreements.[76] These petitioners point out that in the Report and Order we stated that the "cooling-off" period is intended to give outside producers who may have been coerced into signing a co-production arrangement the opportunity to cancel that arrangement within 30 days of execution.[77] According to Chris-Craft/Tribune et al., however, as the rule is written, the agreement does not become binding for 30 days (i.e., its effective date is delayed 30 days). Petitioners contend that this differs from the right to nullify an agreement within that period of time. Thus, they believe that the rule should be revised to reflect our expressed intention.

43. Decision. We will retain the domestic co-production safeguards adopted in the Report and Order.[78] In the Report and Order, we expressed concern that a network could coerce a domestic non-network producer into a co-production arrangement as a condition of carriage on the network so as to obtain back-end rights and, in particular, the right to syndicate the program domestically as an in-house production.[79] We believe that the outside producer's initiation of a co-production arrangement in writing is the best means to ensure that such an arrangement occurs only when both parties are willing to participate. We disagree with CBS/NBC that network certification alone is sufficient to determine whether this is indeed the case. Our procedure, which requires written documentation from each side, will ensure that both parties to a co-production arrangement consider the arrangement fully voluntary.[80] We are also unpersuaded by CBS/NBC's speculation that the

---

75 Coalition Opposition at 15-16.

76 Section 73.659(a)(3).

77 Report and Order at 3119.

78 Id.

79 Report and Order at 3118-3120.

80 Report and Order at 3119-3120.

requirement that co-production arrangements be producer-initiated is unworkable because it will impede communications between parties.

44. In any dealings between a network and an outside producer, we are concerned that the network could potentially extract financial interests and syndication rights for less than a compensatory price as a condition of carriage on its network.[81] A domestic co-production agreement involves sharing of ownership and responsibility for the program as well as the acquisition of financial interests and syndication rights. Although co-productions inherently require substantial cooperation and sharing of responsibilities between the parties to the production, networks still possess the power to extract rights from their "co-producers" because they control access to network exhibition. Both the producer initiation requirement and the "cooling-off" period allow the parties to enter into co-production agreements while still protecting against an outside producer being coerced into such a venture. Moreover, we note that the networks have urged the adoption of a cooling-off period as an alternative to the phased negotiation process adopted in these rules for network acquisition of financial interests in outside productions.[82] We thus reject CBS/NBC's argument that the "cooling-off" period is unworkable.

45. To effect our expressed intention with respect to the mechanics of the 30-day "cooling-off" period, we will grant Chris-Craft/Tribune et al.'s request to clarify Section 73.659(a)(3). As petitioners indicate, we stated that the purpose of the 30-day cooling-off period is to give "an outside producer who may have been coerced into signing a co-production arrangement...the option of negating the arrangement... ."[83] Accordingly, we revise Section 73.659(a)(3)(ii) to provide that such a co-production arrangement "may be nullified by the outside production entity during a 30-day period after it is executed and before it becomes binding."

46. Domestic Co-Production "Script Freeze". In its petition for reconsideration, the Coalition asks that we prohibit the practice of "script freezes" in conjunction with the right of outside producers to nullify co-production agreements.[84] According to the Coalition, the networks regularly impose a "script freeze" that prevents a producer from taking a script to another network for a year after the producer and network fail to agree on a license fee. It contends that if a producer can negate a co-production agreement but cannot shop the project elsewhere or choose to produce the program itself, the 30-day "cooling-off" period provides relief only in theory.

47. The networks oppose adding a ban on script exclusivity to the

---

81 Report and Order at 3109, 3119.

82 CBS/NBC Petition at 9-10.

83 Report and Order at 3119.

84 The Coalition seeks a ban on script freezes, or alternatively a rule that voids any script freeze that applies to producer-nullified co-productions. Coalition Petition at 19-20.

"cooling off" period for domestic co-productions.[85] They explain that a "script freeze" is a short term exclusive right to develop a script in return for financing. It is designed to protect the networks' investment in that script. The networks state that the "cooling off" period is meant to give the producer an opportunity to cancel a co-production arrangement that it regards as disadvantageous. They argue that there is no reason to couple the ability of a co-producer to nullify an agreement with the entirely separate obligation to honor any short-term script exclusivity. The networks believe that the result would be to discourage network investment in scripts and network participation in entirely voluntary, mutually beneficial co-production arrangements.

48. Decision. We reject the Coalition's proposal to impose a prohibition on "script freezes" in conjunction with the "cooling-off" period safeguard. The "cooling-off" period is intended to ensure that an outside producer is not coerced into a co-production arrangement or required to cede the related rights to a production for less than fair market value. The voiding of a co-production arrangement during the "cooling-off" period does not necessarily mean that the network will not continue to license the program, only that the outside producer chooses to retain ownership of and responsibility for the program or to share these factors with an entity other than the network.

49. "Script freezes" are exclusivity rights presumably obtained by a network in return for its investment in the development of particular programming.[86] We believe that this is generally a limited and legitimate business practice that protects the network's financial and creative investment in a script in which it retains an interest.[87] We observe that, without such exclusivity, a network could invest resources to develop a program and then lose the exhibition rights to the program before it has adequate time to decide whether to go forward with the project. Thus, we conclude that we will not adopt a limit on "script freezes." Such matters could more appropriately be handled through contract negotiation. However, we would be concerned if script freezes were used by the networks, contrary to their representations about their typically limited invocation of such rights, to undermine the "cooling off" safeguard we have imposed.

---

85 Joint Network Opposition at 6-8.

86 We note that the networks represent that the script freeze is only invoked when a network-financed script is selected for pilot production and the parties have not reached agreement on all the license terms. Joint Network Opposition at 7.

87 We note that the movie studios obtain exclusivity for their television and movie scripts. Joint Network Opposition at 7.

## V. Off-Network Syndication

### A. Domestic Syndication

50. Rule. The rules permit networks to hold or acquire domestic syndication rights.[88] However, a network may actively syndicate (i.e., distribute) in domestic markets only prime time entertainment programming that is produced in-house and aired on its own network.[89] The syndication of such programs is subject to affiliate favoritism and anti-warehousing safeguards.[90] All other prime time entertainment programming in which a network holds or acquires syndication rights must be distributed through an independent syndicator.[91]

51. Active Syndication by Networks. The Coalition, Chris-Craft/Tribune et al. and INTV request that the rules be changed to prohibit all active domestic syndication by networks.[92] Petitioners observe that the networks do not need to actively engage in syndication to receive revenues from the distribution of their programs.[93] They assert that the rules permit the networks to hold passive financial interests in network programs, thus enabling them to share the rewards, as well as the risks, of network program productions and enhancing their ability to compete in the video marketplace.

52. These petitioners are concerned that the anti-warehousing and affiliate favoritism safeguards will not provide adequate protection for independent stations.[94] They observe that we found that the networks have an economic incentive to favor their owned or affiliated stations over other

---

88 47 CFR § 73.659(a).

89 47 CFR § 73.660(a).

90 47 CFR § 73.660(b) and (c).

91 47 CFR § 73.660(a).

92 Coalition Petition at 20-24; Chris-Craft/Tribune et al. Petition at 2-6; INTV Petition at 4-9.

93 INTV also contends that the networks mischaracterize and overstate the potential for new revenue from the active domestic syndication of their in-house programming. Because only active syndication of in-house productions is at issue, INTV states that the networks will simply be paying themselves -- rather than an independent distributor -- to distribute their own programming. INTV Reply at 3.

94 Coalition Petition at 21-23; Chris-Craft/Tribune et al. Petition at 5-6; INTV Petition at 6-7.

stations (especially independents)[95] and have the ability to engage in anti-competitive behavior given their affiliate relationships, market penetration and expenditures to acquire programs.[96] Parties believe that these reasons justify a ban on all network syndication. Moreover, INTV notes that a ban on active syndication will end disagreements concerning the efficacy of safeguards.[97]

53. CBS/NBC objects to the rationale for limiting network participation in syndication in order to monitor such activities since they claim to be effectively prevented from entering the off-network syndication business for four years. Thus, CBS/NBC asserts that network syndication will essentially be non-existent during the review period. The networks oppose the proposed total ban on domestic syndication requested by INTV, the Coalition and Chris-Craft/Tribune et al.[98] They state that the proposal goes against our goals to allow the networks to compete more effectively, to generate new revenue sources, and to add competition in the bidding for back-end rights.[99] Moreover, since we determined that off-network programming plays a "critical role" in the "viability of independent stations," the networks assert that we should not ignore the public interest benefits that would accrue from permitting new entrants into this marketplace.[100] They further claim the ability to distribute this programming will increase competition in the supply of such programming to independent stations.

54. The independent stations disagree with the networks' claim that fewer restrictions on active syndication by the networks would increase competition and benefit independent stations. INTV acknowledges that three new entrants theoretically should enhance competition. However, because the entrants in this instance are vertically-integrated networks, INTV argues that less competition may actually result. INTV asserts that the increased risk of anti-competitive behavior offsets any potential benefit from entry into the market.[101] Chris-Craft/Tribune et al. assert that if network participation in

---

95 The Coalition further asserts that the ability to actively distribute syndicated programming will provide another incentive for the networks to favor their in-house productions. Coalition at 23-24.

96 Chris-Craft/Tribune et al. Petition at 2.

97 INTV Petition at 6. In its opposition to the CBS/NBC proposal to permit syndication of off-other-network programming, the Coalition similarly argues that the prohibition against network syndication should be retained to test the effectiveness of the affiliate favoritism and anti-warehousing safeguards. Coalition Opposition at 21-22.

98 Joint Network Opposition at 11-13.

99 Joint Network Opposition at 12. Report and Order at 3107, 3134.

100 Joint Network Opposition at 13.

101 INTV Reply at 4.

syndication would enhance competition, then independent stations would support repeal of the syndication ban since their reliance on off-network programming would make them the primary beneficiaries of any increased competition.[102] However, Chris-Craft/Tribune et al. note that independent stations do not argue that network entry is either necessary for or beneficial to increasing competition in the market.

55. Press argues that the new syndication rule is too restrictive and that the networks should be permitted to obtain additional revenue from the syndication market.[103] In light of changes in the video marketplace, Press asserts that there is no reason to deny the networks this right that their cable and independent station competitors already have. However, Press recommends that in return for increased syndication rights, networks should be required to allocate a specific percentage of network time for the provision of news and public affairs programming, although there would be no requirement that affiliates air the programming.

56. Decision. We affirm our decision to permit limited active syndication by networks, subject to affiliate favoritism and anti-warehousing safeguards. We reject the request by the Coalition, Chris-Craft/Tribune et al., and INTV to prohibit all active domestic syndication by networks. As we stated in the Report and Order, we find that the public interest will be furthered if the networks are allowed some entry into the syndication marketplace,[104] as it will enable the networks to generate additional revenues and thereby compete more effectively in the video marketplace as a whole. While we believe that the anti-warehousing and affiliate favoritism safeguards adopted in the Report and Order are necessary to protect independent stations from potential anti-competitive behavior by the networks, we intend to monitor closely the efficacy of those safeguards so as to minimize the risk that even limited direct network participation in domestic syndication will jeopardize the supply of off-network syndicated programming so critical to the competitive viability of those stations.

57. Moreover, we have limited the amount of programming that a network can control in the syndication marketplace to allow us to study whether the safeguards we have adopted are, in fact, effective deterrents to network abuse. We also believe that limited network entry into the off-network syndication market could increase the supply of syndicated programming. We also emphasize that passive financial interests are intended to complement, rather than replace, the opportunities for networks to actively syndicate programming. Therefore, prohibiting networks from any active domestic syndication of programming, as suggested by these parties, would forfeit these benefits.

---

102 Chris-Craft/Tribune et al. Reply at 2.

103 The Press petition is confusing on this point since the networks are now permitted to receive revenues from syndication; only active syndication is restricted.

104 Report and Order at 3129.

58. Finally, we reject Press's proposal that we condition network syndication activity on their production of specified percentages of news and public affairs programming. We find that such a requirement, while laudable, would not protect the supply of off-network programming in the domestic syndication marketplace. Moreover, we note that networks, as licensees, already have an obligation to program in the public interest.

59. Active Syndication of "Off-Other-Network" Programs. CBS/NBC seeks to eliminate the prohibition against active syndication by a network of programs aired on another network.[105] Petitioner argues that this ban impedes the networks' ability to compete and deprives them of needed revenues.[106] It states that a network has no ability to condition access or exercise leverage in the case of off-other-network programming since it is not dealing with its own schedule and that existing rules address the specific concerns -- warehousing and affiliate favoritism -- that led to this ban.

60. The Coalition, INTV and Chris-Craft/Tribune et al. dispute the networks' contention that those safeguards are adequate.[107] They state that our decision to limit active network syndication to off-network programming produced in-house and aired by a network on its own schedule is reasonable and well within our discretion given our concerns about the effectiveness of the affiliate favoritism and anti-warehousing safeguards and our desire to test them on a limited basis.[108] The Coalition argues that the potential for a network to favor its affiliates and disadvantage independent stations derives from its control over the distribution of syndicated product. That potential, according to the Coalition, is no less for off-other-network programs than for off-network programs aired by a network on its own schedule. INTV asserts that network involvement in active syndication, even with safeguards, may threaten the supply and diversity of programming available to independent stations. It contends our limits on active syndication by the networks will permit us to ascertain how the networks behave as syndicators and how effective the safeguards are in preventing anti-competitive behavior. In addition, Chris-Craft/Tribune et al. contend that the networks may be entitled to actively syndicate in-house programming that they produced or co-produced for their own schedules, but that no such equities exist with respect to other networks' programming.

61. Decision. We affirm our decision in the Report and Order to prohibit networks from actively syndicating programs that are not aired on their own schedule. In the Report and Order, we emphasized the necessity of structural limits to promote our goals for diversity as well as competitiveness in the

---

105 CBS/NBC Petition at 23-24.

106 Joint Network Opposition at 12.

107 Coalition Opposition at 21-22; INTV Opposition at 8-9; Chris-Craft/Tribune et al. Opposition at 15.

108 Report and Order at 3135.

syndication marketplace.[109] We believe that the CBS/NBC proposal is inconsistent with our decision on active syndication by networks, particularly with respect to our remaining concerns about the capacity for network anti-competitive behavior. As we suggested in the Report and Order, permitting network domestic syndication of programs which air on another network could allow it to control an overwhelming share of off-network programs syndicated to local stations. Although CBS/NBC argues that a network may not exercise leverage concerning programs that air on another network's schedule, we find that a network's opportunity to condition access to time slots for future programs could influence the syndication negotiations. We reiterate our concern that -- despite an increase in viewer alternatives in the past 20 years -- the networks retain the ability to extract distribution rights from outside producers (even as to programs airing on other networks) in exchange for access to their schedules, as well as to engage in other anti-competitive abuses.[110] Consequently, we find that the syndication opportunities granted to networks, subject to the safeguards adopted in the Report and Order, are appropriate steps given the current video marketplace and will allow limited entry in order to assess the effectiveness of the safeguards.

62. Affiliate Favoritism Presumption. The rules provide a rebuttable presumption of affiliate favoritism when a program in which a network holds an interest is syndicated to its O&Os and affiliates in more than 30 percent of the markets where the program has been sold.[111] INTV observes that this presumption still permits a network to sell to stations serving up to 73 percent of all television households before reaching the 30% threshold.[112] Thus, INTV proposes that an additional presumption of favoritism arise where the sale of a program to affiliates or O&Os occurs in markets representing over 30 percent of the nation's television households.[113] According to INTV, this proposal is consistent with the new network definition that looks at the percentage of households a network serves. The Coalition also proposes that we strengthen the affiliate favoritism safeguard to presume favoritism if a network sells to its O&Os and affiliates in more than 30 percent of either the total markets or the top 50 markets.[114] The Coalition states that a standard of 30 percent of all markets sold presumption is a poor indicator of network

---

109 Report and Order at 3125, 3129.

110 Report and Order at 3130.

111 47 CFR § 73.660(b).

112 The networks continue to repeat their argument that they have neither the incentive nor the ability to engage in favoritism or warehousing and that the existing safeguards are sufficient. In particular, they note that the new rules rebuttably presume affiliate favoritism if the threshold is exceeded and that, even if it is not, an aggrieved party may file a complaint with us. Joint Network Opposition at 17.

113 INTV Petition at 17-18.

114 Coalition Petition at 24, n. 72.

favoritism given the importance of program clearances in the top 50 markets.

63. CBS/NBC asks that we modify the rebuttable presumption to presume that a network has not engaged in affiliate favoritism when sales of a program to its O&Os and affiliates fall below the 30 percent threshold.[115] In opposing this alternative, INTV states that the parties likely to complain about affiliate favoritism, such as independent stations and affiliates of other networks, will not have access to network records.[116] INTV contends that the existing presumption counterbalances this lack of access to vital information by shifting the burden back to the party with such information. Thus, according to INTV, the lack of a presumption in the networks' favor is reasonable because they have the necessary information to defend a complaint.

64. Decision. We affirm our decision to establish a rebuttable presumption of affiliate favoritism when a network syndicates a program in which it holds an interest to O&O and affiliate stations in more than 30 percent of the markets where the program has been sold. Since the top ten markets represent 31 percent of all television households, we find that INTV's proposal would severely restrict the flexibility of the networks to sell syndicated programming. As a result, INTV's standard could be readily met even by a statistically insignificant number of sales to affiliates in larger markets. Conversely, we also reject CBS/NBC's request to shift the burden of the presumption, including sales to affiliates. We note that the safeguard was established in the Report and Order due to the possibility of network anti-competitive behavior in syndication negotiations. Therefore, the burden of this presumption is appropriately placed on networks as the parties whose actions are monitored in order to prevent conduct favoring their affiliates. We emphasize that the networks will have an opportunity to respond with supporting information to indicate the lack of favoritism. Consequently, we find that the networks are the most direct source of information relevant to possible favoritism and, where challenged, should assume the burden of proving that their conduct during negotiations was not anti-competitive.

65. Anti-Warehousing Rule. Where a network has syndication rights in prime time entertainment programming, it is required to make that programming available for non-network exhibition within a specified period under the rules.[117] INTV recommends extending this rule to all network prime time programming regardless of the network's interest, even if the network only had

---

115 CBS/NBC at 20, n. 50.

116 INTV Opposition at 12.

117 47 CFR § 73.660(c). The rule requires a network to make prime time entertainment programming in which it has syndication rights available for non-network broadcast exhibition within the U.S. no later than the earlier of: (1) the end of the fourth year after network exhibition of such series has commenced, or the subsequent anniversary of that date as to all programs in that series aired after the fourth year, or (2) 180 days after network exhibition of such a series or program is completed.

exhibition rights.[118] INTV asserts that a network could prevent a program from being syndicated through a contractual provision granting it extensive privileges for temporal exclusivity. Although the consent decrees currently limit temporal exclusivity in network exhibition agreements,[119] INTV argues that once this provision expires the networks may extract such exclusivity unless a rule requires syndicating all programs in a timely fashion.[120] In addition to opposing further safeguards that might interfere with their ability to participate in exclusivity arrangements, the networks contend that extending the anti-warehousing rule to programs in which networks have no financial or syndication interest is beyond the scope of this proceeding.

66. Decision. The rules require a network to release within a specified time period all prime time entertainment programming for which it holds syndication rights for off-network exhibition. We affirm this anti-warehousing safeguard. We do not, however, believe it desirable to extend the safeguard to network prime time programming in which a network has no such rights. In the Report and Order, we concluded that networks maintain both the ability and the economic incentive to selectively withhold programming from off-network syndication. As a result, we believe that the networks could potentially harm stations affiliated with other networks as well as independent stations. These conclusions and our adoption of these safeguards were based on our analysis of the incentives involved in network acquisition of a financial interest and syndication right beyond the basic network exhibition right. We are not, herein, attempting to address any more general concern with the contractual exclusivity a network acquires in association with network exhibition rights. That issue remains governed by the network consent decrees[121] and is not the focus of this proceeding. Thus, while we continue to believe that the anti-warehousing safeguard is necessary to protect local broadcast stations, we find that INTV's proposal is unnecessarily restrictive based on the record before us.

67. "Independent Syndicator" Definition. The rules state that a television network may only actively syndicate within the United States programming produced in-house and aired on its own network. Any other prime time entertainment programming in which a network holds the syndication rights must be syndicated domestically through an independent syndicator.[122] An "independent syndicator" is defined as one not owned or controlled, in full or in part, by a television network.[123] INTV proposes specific guidelines to define the scope of our proscription that a network should have no interest in

---

118 INTV Petition at 13.

119 INTV Petition at 13-14. See also n. 4 supra.

120 Joint Network Opposition at 16, n.51.

121 See n. 4 supra.

122 47 CFR § 73.660(a).

123 47 CFR § 73.662(f).

the independent syndicator.[124] INTV's proposed guidelines would prohibit: (1) ownership interests of any kind; (2) the network or any person or entity affiliated with the network from having a convertible or security interest in any asset of the independent syndicator or its affiliates which, if exercised, would permit the network or person or entity affiliated with the network to gain any interest in the independent syndicator; and (3) the network or any person or entity affiliated with the network from serving as a director, officer, employee, agent or independent contractor of the independent syndicator or from having served in such capacity during the previous year. INTV argues that these guidelines are needed to ensure that a network cannot influence the actions of the independent syndicator to which it transfers syndication rights. Thus, it also proposes guidelines to prevent the ongoing contractual relationship between a network and an independent syndicator from becoming an avenue for network control or influence over syndication of a program.[125] These guidelines would prohibit network: (1) involvement in the operations of the entity owning the program or in the syndication of the program; (2) communications with the syndicator relating to the syndication of the program; (3) action as agent or consultant for the syndicator; (4) rights to approve the sale of syndication rights or non-network exhibition rights; and (5) ownership interest in any asset of the syndicator which would permit it to take any action inconsistent with the above limitations. Further, INTV argues that these after-the-fact remedies such as application of our anti-warehousing safeguard to independent distributors and our affiliate favoritism safeguard are meaningless in the dynamic television marketplace and that its proposed specific guidelines provide a better means for preventing network misbehavior before it occurs.[126]

68. Chris-Craft/Tribune et al. request that we clarify the definition of "independent syndicator."[127] They contend that the current definition does not protect independent syndicators from network influence, nor does it explicitly apply the affiliate favoritism and warehousing prohibitions to the distribution of programming by independent syndicators.[128] Therefore, petitioners suggest that we modify the definition to provide not only that an independent syndicator must be free of network ownership or control, but also that there must be no contractual arrangements or understandings between the network and the distributor regarding subsequent licensing or scheduling of the syndicated program. In addition, they believe that the rules should clearly indicate that any syndicator failing to comply with the affiliate favoritism or warehousing safeguards when distributing programs produced by a network or in

---

124 INTV Petition at 9-10, Appendix A.

125 INTV Petition at 10-12, Appendix B.

126 The networks argue that these additional guidelines are unnecessary and take issue with several specific elements of the proposal. Joint Network Opposition at 17-18.

127 47 CFR § 73.662(f). Chris-Craft/Tribune et al. Petition at 12-14.

128 Report and Order at 3137, 3146.

which a network holds a financial interest does not qualify as an independent syndicator.

69. Decision. We continue to believe that the networks should not be able to steer the distribution of off-network syndicated programming or favor their owned and operated or affiliate stations when selling their syndication rights in a program to another party. Thus, in the Report and Order, we determined that these rights must be sold to an independent syndicator. We reiterate here, in response to the request from Chris-Craft/Tribune et al., that this requirement precludes not only any network ownership interest in or control or influence over the syndicating entity, but also any understandings, contractual arrangements or practices related to or resulting in steering or warehousing of programming on behalf of a network. "Independent syndicators" are mandated by the rules where active network syndication is not allowed in the off-network or first-run program markets. To permit network influence over the negotiations between independent distributors and local broadcast stations would endanger the legitimate program acquisition interests of local stations.[129] While we thus reaffirm that the syndicators involved must be truly independent, in both form and in substance, we decline to adopt the potentially excessive regulations proposed by INTV. Moreover, we do not intend that contractual provisions regularly included in agreements between program producers and syndicators should be precluded where they are neither discriminatory nor implicate steering or warehousing concerns.

## B. Foreign Syndication

70. Rule. The rules permit the networks to syndicate in foreign markets all their in-house productions aired on their own or another network or in first-run syndication. They also may syndicate internationally all outside productions aired on their own or another network.[130] International syndication of first-run programs that are not produced "solely" in-house is limited to those programs not distributed in the United States.[131]

71. Foreign Syndication of Off-Network Programs. Orbis requests that we reconsider our decision to allow the networks to engage in foreign syndication of prime time entertainment programming produced by others.[132] Orbis contends that independent producers will not be able to compete in the international arena with programming that has appeared on the networks' prime time schedules.

---

129 Report and Order at 3137.

130 In this regard, we reiterate the concern we have expressed earlier that arrangements permitted by the rules not be used to "cross-extract" financial interest or syndication rights in a program aired elsewhere as a condition of licensing a different program for its own network. See Report and Order at 3140, n. 140.

131 47 CFR § 73.659(b).

132 Orbis Petition at 1-2.

It argues that profits from foreign syndication are essential to the continued ability of independent producers to compete domestically in producing television programming. Orbis also states that the ability of independent producers to sell successfully overseas has been important for the United States, not only because of the substantial, positive impact on our balance of trade, but because it has enhanced the diversity of programming to the American viewing public. In response to Orbis, the networks concur with our statement that there is "no reason to preclude the networks from this market."[133]

72. Decision. In the Report and Order, we noted the proliferation of production resources in the international marketplace.[134] Furthermore, we observed that the concerns regarding anti-competitive behavior in distributing syndicated programming in domestic markets are not relevant to foreign markets. Therefore, in the absence of new evidence from the petitioners, we affirm our decision to allow networks to engage in foreign syndication of off-network prime time entertainment programming produced by others. Networks, of course, continue to have the right to engage in foreign syndication of their own in-house productions, as well. We continue to find no cause to prevent networks from entering this market, and the networks' presence could increase the supply of syndicated programming in foreign markets.

73. Foreign Syndication of First-Run Programs. Chris-Craft/Tribune et al. state that the Report and Order makes it clear that networks will not be permitted to syndicate internationally any first-run programming. They ask that a new provision be added to the rules to make it clear that this prohibition applies to foreign as well as domestic syndication.[135]

74. Decision. We deny the request by Chris-Craft/Tribune et al. to amend the rules to prohibit networks from syndicating first-run programs in foreign markets. Contrary to the representation of Chris-Craft/Tribune et al., the Report and Order permits networks to syndicate in foreign markets all first-run programs produced in-house.[136] Due to the unique nature of the domestic first-run syndication market, we precluded networks from actively syndicating first-run programming in domestic markets. The domestic syndication rights for first-run programs "solely produced" by the networks must be transferred to independent syndicators. However, the prohibition against foreign syndication of first-run programming applies only to outside productions syndicated in the U.S., and networks may actively syndicate abroad any first-run programs that they produce in-house. Networks also may retain the foreign syndication rights for any first-run programs exhibited entirely outside the United States, regardless of where the programs are produced. We reaffirm our view, however, that the rules must continue to prevent the possibility of networks extracting foreign syndication rights from domestic, non-network producers of first-run

---

133 Joint Network Opposition at 11 citing Report and Order at 3141.

134 Report and Order at 3140-3141.

135 Chris-Craft/Tribune et al. at 11.

136 Report and Order at 3140, 3146.

programs as a condition of access to the owned and affiliated stations' program schedules.[137]

## VI. First-Run Syndication

75. Rule. A network may produce entertainment programming for first-run syndication and retain a financial interest and foreign syndication rights in such programming "solely produced" in-house.[138] Such programming, however, shall be syndicated domestically only through an independent syndicator. As with our off-network rules, the independent syndicator must be insulated from network influence and its conduct is subject to the same affiliate favoritism safeguards.[139]

76. Prohibition on First-Run Syndication. CBS/NBC seeks elimination of the restrictions on network acquisition of interests in or distribution of first-run syndicated programming.[140] Petitioner argues that the networks have no unique market power that can be used to extract rights from outside producers for this programming. CBS/NBC asserts that a network's ability to control clearances, handicap a new first-run program, or exercise market power in the distribution of such programs is no different from that of other station group owners.[141] It points to difficulties in obtaining clearance of certain network programs as evidence of its inability to force syndicated programming on affiliates.[142] King World counters that the limited clearance difficulties cited by the networks do not justify permitting network entry into first-run syndication. It states that the lack of evidence regarding network clearance problems in general indicates that networks are indispensable as program suppliers to their affiliates.[143] Similarly, INTV contends that the limited clearance data does not demonstrate any network weakness in dealing with their affiliates. INTV states that the fact that the networks provide no comprehensive data regarding clearance problems suggests that the clearance rate for network programming remains high.[144]

77. CBS/NBC states that the existing ban on affiliate favoritism is

---

137 Report and Order at 3140, n. 140.

138 47 CFR § 73.659(b).

139 Report and Order at 3146.

140 CBS/NBC Petition at 15-23.

141 CBS/NBC Petition at 15-16, 18-19.

142 For example, CBS/NBC reports that nearly half of CBS' affiliates do not carry the network's late night programming. CBS/NBC Petition at 21, n. 51.

143 King World Opposition at 7-8.

144 INTV Opposition at 7.

sufficient to address the concerns regarding the possible improper use of leverage by the networks over their affiliates. CBS/NBC further states that there is no reason to prohibit the networks from obtaining syndication rights in first-run foreign co-productions when they are permitted to acquire such rights in off-network foreign co-productions.[145] Consistent with our decision regarding off-network programming, CBS/NBC claims that this right would be pro-competitive, would enhance U.S. competitiveness overseas and would benefit the public since the increased revenues they receive could be used for more diverse and creative programming.[146] King World, however, points out that CBS/NBC misstates its rights under the rules. In this regard, it states that the networks can syndicate internationally all in-house productions, including first-run programs.[147] King World also observes that Section 73.660(a) of the rules reflects this policy determination to limit the direct prohibition on network entry into the syndication business only with respect to stations in the U.S. Furthermore, CBS/NBC contends that we went beyond our statutory authority when we adopted this ban on network participation in first-run syndication, especially since we have shown no nexus between network ownership of broadcast stations and the harm that we seek to prevent. It urges that such restrictions are inequitable and discriminatory and should be applied either to all large stations groups -- including particularly those with syndication activities -- or no restraints should be applied at all.

78. Independent stations and syndicators oppose the CBS/NBC request to expand network participation in the first-run syndicated programming market. These parties concur with our finding that restrictions are needed to preserve and promote competition.[148] They argue that these restrictions are not intended merely to prevent complete monopolization of this market. Parties representing independent stations argue that the networks can restrict the supply of first-run programming to their stations. INTV states that the networks will deprive independent stations of access to attractive syndicated programming that their affiliates also want to carry. Chris-Craft/Tribune et al. assert that the networks would steer their first-run programming to their

---

145 CBS/NBC Petition at 22. CBS/NBC claims that the networks cannot engage in "direct distribution, either domestically or abroad, of any first-run syndicated programming." CBS/NBC Petition at 17.

146 Report and Order at 3141.

147 King World Opposition at 2-3.

148 Report and Order at 3142, 3144. In this regard, CBS/NBC argues that the networks did not engage in anti-competitive conduct in the first-run syndication market prior to adoption of financial interest and syndication rules in 1970. CBS/NBC Petition at 17. Chris-Craft/Tribune et al. and others dispute this claim and further state that there is greater incentive and potential for anti-competitive network behavior in today's first-run marketplace where syndication revenues are substantially greater. Chris-Craft/Tribune et al. Opposition at 5-7.

affiliates in order to weaken their competitors.[149]

79. The Coalition and others contend that the networks ignore the factors that distinguish them from other group owners -- an affiliate structure that enables them to reach 98 percent of all households as well as network owned and operated stations in the top markets.[150] The Coalition contends that this combination enables the networks either to extract rights in or to handicap the launch of new programs by independent first-run syndicators. PPDC and King World argue that the networks have the unique advantage of being able to offer syndicated programs to their affiliates which already have O&O station clearances in top markets -- a critical step for first-run programs.[151] King World asserts that the availability of alternative broadcast outlets in major markets does not diminish the networks' gatekeeper role because clearance of a first-run syndicated program on a network O&O substantially enhances its chances of success. The Coalition observes that even when a syndicator owns an independent station in a market, this independent station often cannot compete with affiliates for its own syndicated programs.[152] The Coalition argues that, if the network were the syndicator, it would never be the case that the independent station could obtain the programs syndicated by the network. Furthermore, parties opposing the CBS/NBC request believe that the affiliate favoritism safeguards would not be sufficient since they are not intended nor well-suited to protect affiliates from network pressure on affiliates to accept programming.

80. The Coalition, INTV, Chris-Craft/Tribune et al., King World and PPDC provide support for our authority to adopt this rule.[153] They observe that a

---

149 Chris-Craft/Tribune et al. also argue that the networks would use their ability to grant network affiliation and other incentives to pressure their affiliates to purchase network syndicated first-run programming.

150 See, e.g., Coalition Opposition at 17-18. PPDC observes that Fox also owns stations in the largest markets and has a network of affiliates, but it notes that Fox has yet to reach the threshold of the new network definition.

151 King World Opposition at 5-7. Chris-Craft/Tribune et al. provide data to show that the top 10 first-run syndicated programs generally are cleared by O&Os in the top three markets. In addition, they demonstrate that most of the top first-run syndicated programming is cleared by affiliates even though independent stations are potential buyers of these programs. (For example, 99.5 percent of the stations carrying "Wheel of Fortune," the top program, are network affiliates.) Chris-Craft/Tribune et al. Opposition at 8, 10-11.

152 For example, "The Arsenio Hall Show" is carried by the CBS affiliate in Washington, D.C., even though the syndicator, Paramount, owns an independent station in this market. Coalition Opposition at 19.

153 Coalition Opposition at 20-21; INTV Opposition at 9; Chris-Craft/Tribune et al. Opposition at 13-14; King World Opposition at 10-11; PPDC Opposition at 7-8.

previous, more restrictive rule was deemed "reasonably ancillary" to our responsibility to regulate television broadcasting upon court review.[154] PPDC states that the rule is "reasonably ancillary" to our express statutory authority to regulate broadcast television. They support the conclusion that, if the networks were allowed to syndicate first-run programming, the amount of non-network, nationally produced programming, which is a major source of competition and diversity, would be diminished.[155] The Coalition adds that this prohibition is supported by the record and that it is no less "reasonably ancillary" today than it was 20 years ago. Chris-Craft/Tribune et al. and King World also assert that we have shown a clear nexus between the networks' ownership of stations -- as well as their affiliate relationships -- and the harm that we seek to prevent.[156] In particular, King World argues that we have shown, and the record also demonstrates, that there are empirical distinctions between the market power of the networks and other large station groups.[157] King World also states that rules based on station ownership have been upheld. Moreover, King World asserts that differing regulatory regimes are lawful because there are identifiable differences between the networks and other group owners.[158]

81. Decision. We deny the request by CBS/NBC to eliminate the restrictions preventing networks from acquiring interests in or distributing first-run syndicated programming in domestic markets. In the Report and Order, we emphasized that first-run syndication is a unique marketplace in which clearance by stations in major markets is critically important.[159] Due to the necessity of establishing clearance for each first-run program through individual stations, we expressed concern that networks could exploit their relationships with O&O and affiliate stations in major markets to extract rights or to handicap the launch of new programs by independent first-run syndicators. We find that these structural safeguards remain necessary, as we continue to believe that permitting networks to syndicate first-run programs -- particularly if a network packages groups of first-run programs to local stations -- could undermine our diversity objectives. We are particularly concerned about potential harm to our objectives in establishing the prime time access rule. Moreover, since the unique relationship between networks and their owned and affiliated stations creates the possibility of anti-competitive

---

154 Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 487 (2d Cir., 1971).

155 Report and Order at 3145.

156 Report and Order at 3144-3146. See e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 794-96 (1978) (multiple ownership rules applied to newspaper owners). See also National Broadcasting Co. v. U.S., 319 U.S. 190 (1943) (Chain Broadcasting Regulations).

157 King World Opposition at 11.

158 See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

159 Report and Order at 3144.

behavior in limiting the availability and launch of first-run programs, we conclude that this decision is within our statutory authority. Therefore, we affirm our decision in the Report and Order to preclude active network participation in the domestic syndication of first-run programs.[160]

82. Clarification of the Syndication Rule. Chris-Craft/Tribune et al. and PPDC assert that the new rules as adopted do not accurately reflect our decision to prohibit networks from actively syndicating any first-run programming.[161] Specifically, Chris-Craft/Tribune et al. contend that the rule setting forth what rights a network may obtain in programming, Section 73.659(b), applies only to network acquisition of financial interests and syndication rights rather than to active syndication (i.e., distribution) of such programming, yet the new syndication rule, Section 73.660, does not make that distinction clear. To clarify matters, they recommend that a subsection be added to Section 73.660 to explicitly prohibit the networks from active syndication of any first-run programming, including those programs produced solely in-house in which they may hold financial interests and syndication rights.

83. PPDC asserts that Section 73.660(a)(2) only prohibits network syndication of prime time entertainment programs produced by others.[162] However, PPDC observes that we decided to retain the prohibition on network syndication of first-run programming produced by others regardless of whether those programs run during prime time or non-prime time periods.[163] Thus, PPDC, the Coalition and King World suggest that Section 73.660 be amended to clearly reflect our decision.[164] The Coalition adds that the rules should clearly indicate that the networks cannot syndicate outside-produced first-run programming in the foreign or domestic market.

84. Decision. We affirm our decision in the Report and Order that prohibits networks from actively syndicating first-run programming in domestic markets, and we agree with petitioners that the rules do not accurately reflect our decision. In particular, we shall make explicit our prohibition of network domestic syndication of first-run programming regardless of whether those programs are exhibited during prime time or non-prime time periods. Therefore, we amend Section 73.660 of the rules to clearly indicate that networks are precluded from actively participating in domestic syndication of

---

160 Report and Order at 3144-3146.

161 Report and Order at 3146. Chris-Craft/Tribune et al. Petition at 10-11; PPDC Petition at 3-4.

162 In this regard, Chris-Craft/Tribune et al. state that Section 73.660(a), which is intended to govern network syndication of off-network programming, could be read to prohibit network syndication of some, but not all, first-run programming.

163 Report and Order at 3103, 3142.

164 King World Opposition at 1; Coalition Opposition at 17, n. 50.

any first-run programming.

## VII. Prime Time Access Rule

85. Rule. The prime time access rule (PTAR) prohibits network affiliated television stations in the 50 largest television markets from devoting more than three of the four hours of prime time to the presentation of programs "from a national network" or "programs formerly on a national network (off-network programs)."[165] The Commission stated in its Further Notice of Proposed Rulemaking that we would not "revisit or revise the PTAR in this proceeding."[166] Commenters believing that safeguards or limitations on the networks' involvement with first-run syndicated programming were necessary to preserve the integrity of the PTAR, however, were invited to offer specific proposals for consideration. In our Report and Order, we stated that "network produced first-run programming shall be considered network programming for purposes of the prime time access rule."[167]

86. Definition of Programming "from a national network". Chris-Craft/Tribune et al. request that we add a note to the prime time access rule to reflect our statement that network-produced first-run programming will be considered "network programming for purposes of the prime time access rule."[168] Petitioners argue that this note would ensure that network owned and affiliated stations continue to air independently produced programs during the prime time access period, thus fostering a diversity of programming sources. The Coalition supports this request and states that our interpretation is consistent with PTAR, which includes "programs syndicated by a network (or entities under common ownership or control)."[169]

87. The networks observe that we previously indicated that we would not deal with PTAR in this proceeding.[170] CBS/NBC disagrees with our PTAR interpretation and urges, if the issue is addressed, that programming originally produced by and for network-owned stations will not be considered "network programming" under PTAR.[171] Select Media Communications and Sports

---

165 47 CFR § 73.658(k).

166 See Further Notice of Proposed Rulemaking, MM Docket No. 90-162, 5 FCC Rcd 6463, 6469.

167 Report and Order at 3146.

168 Chris-Craft/Tribune et al. Petition at 12.

169 Coalition Opposition at 16, n. 49. See 1983 Order.

170 Joint Network Opposition at 18, n. 60. See also Further Notice of Proposed Rulemaking, MM Docket No. 90-162, 5 FCC Rcd 6463, 6469.

171 CBS/NBC Petition at 16, n. 39.

Legends[172] urge us to reverse the decision to consider first-run syndicated programming produced by a network or its O&Os, but distributed by an independent syndicator, to be network programming for purposes of PTAR.[173] Parties assert that the networks and their O&Os provide an important product source for small independent syndicators, and that the reversal of this interpretation would encourage a diverse and competitive first-run marketplace without harming either affiliates or independent stations. In particular, Select Media argues that independent syndicators have every reason to distribute their programs to those stations with whom they can arrange the best deal.

88. Decision. We affirm our statement in the Report and Order that first-run programming produced by networks or their owned stations constitutes programming "from a national network" under the terms of the prime time access rule. We believe that our interpretation of the coverage of this rule was consistent with the meaning, purpose, and intent of the prime time access rule, and no party has demonstrated to the contrary.[174] We believe the PTAR itself is sufficiently clear as written and, therefore, we decline to amend the rule as requested by Chris-Craft/Tribune et al.[175]

---

172 The Mass Media Bureau granted grandfather status for PTAR to the program "Memories...Then and Now", which is produced by NBC and syndicated by LBS Communications. See "Memories ... Then and Now", 6 FCC Rcd 5013 (Mass Med. Bur. 1991). Select Media Communications and Sports Legends are responding to the Bureau's statement in that order that it is appropriate to resolve this issue in this proceeding. In addition, LBS Communications submitted a letter regarding this matter on August 19, 1991, the date for filing replies. The letter generated the following late-filings: Opposition to Untimely Petition for Reconsideration, Chris-Craft/Tribune et al., September 3, 1991; Motion to Strike, PPDC, September 10, 1991; Opposition to Motion to Strike, LBS, September 19, 1991; and NBC Comment on PPDC Motion to Strike, NBC, September 23, 1991.

173 INTV argues that we can only codify, but not otherwise change, our decision that network-produced programming will be considered network programming under PTAR because that is the only relevant request that was submitted in the petitions for reconsideration. INTV Reply at 8-9.

174 The statement of the Chief, Mass Media Bureau in Order in BC Docket 82-345, (mimeo 6530, released September 15, 1983), that has sometimes been cited in support of a different interpretation, in fact indicates only that programming syndicated by a network would be excluded from the access period and does not directly address whether programming produced by a network or one of its owned stations would be covered.

175 On August 5, 1991, after our receipt of reconsideration petitions in this proceeding, the Bureau granted petitions permitting affiliate airing of two programs during the access period that were produced by or originated at the facilities of networks or their O&Os. "Memories ... Then and Now", 6 FCC Rcd 5013 (Mass Med. Bur. 1991); "Studio 22", 6 FCC Rcd 5014 (Mass Med. Bur. 1991). These decisions were taken in recognition of the isolated nature of the

## VIII. Transition Rules

89. Rule. We adopted transition rules for entities going from non-network to network status for the purposes of applying the financial interest and syndication rules.[176] Under these rules, programming distributed by an entity prior to becoming a network, and subsequently produced episodes of any series first exhibited by the entity prior to becoming a network, will not be considered network programming for purposes of either the prime time access rule or the financial interest and syndication rules.[177] Stations owned by or affiliated with a new network will be exempt from compliance with the prime time access rule with respect to programming already under contract at the time the entity became a network for a period of 36 months after such entity becomes a network.[178]

90. Grandfathering of Syndication Rights. Chris-Craft/Tribune et al. propose that we require a new network to comply with the rules concerning programming it syndicates for the first time after meeting the network definition even if the program or series is exhibited before that time.[179] Petitioners argue that this more restrictive grandfathering proposal will not significantly burden new networks because they will be aware of the definition threshold before surpassing it. They also contend that such grandfathering is unnecessary because the rules afford considerable latitude for network syndication activities. For example, the rules permit a network to syndicate up to 40 percent of its own prime time entertainment schedule plus all of its

---

situations presented and to avoid adversely affecting already existing syndication arrangements. That action was consistent with the decision to provide a transition period for other program arrangements. In taking these actions the Bureau specifically avoided attempting to alter or clarify the underlying rules and noted that issues regarding the meaning of the prime time access rule resulting from statements in the Report and Order in this docket would be appropriately addressed in this reconsideration decision. The issue had already been raised in the CBS/NBC reconsideration petition (CBS/NBC Petition at 16, n. 39), and the Bureau did not intend to invite another round of pleadings on the issue. Accordingly, while we regard the substance of the issue as legitimately before us, the subsequent filings on this issue will be considered only as informal filings.

176 47 CFR § 73.662(i).

177 47 CFR § 73.658(k), Note 3. The new network, however, must comply with these rules for any future program acquisition.

178 47 CFR § 73.658(k), Note 4. Para. 169 of the Report and Order also states that network affiliates in the top 50 markets are permitted to air programming from the new network during the prime time access period for the duration of an existing contract or three years, whichever comes first. Report and Order at 3153.

179 Chris-Craft/Tribune et al. Petition at 15-16.

non-prime time and non-entertainment programs.

91. Fox and the Fox Affiliates oppose Chris-Craft/Tribune et al.'s grandfathering proposal.[180] They believe that our rules correctly distinguish between ownership rights obtained before an entity becomes a network and future program acquisition. Fox and its affiliates point out that program ownership interests are usually negotiated at the outset of a production arrangement. They state that parties to such agreements have legitimate expectations that agreements entered into years before an entity becomes a network will not be frustrated by the need to comply with the rules. In addition, Fox argues that a network's ability to syndicate up to 40 percent of its program schedule (i.e., in-house productions) is not a substitute for grandfathering. It observes that a new network will have to comply with the schedule cap for all programming acquired after attaining network status. Fox believes that to subject new networks to the cap on airing of in-house productions and to disrupt pre-existing contractual relationships would increase the burden on emerging networks contrary to the intent of the transition rules.

92. In their reply, Chris-Craft/Tribune et al. state that Fox's concerns are unfounded because the proposed revision to the grandfathering rules will not disrupt existing arrangements as Fox claims. Chris-Craft/Tribune et al. argue that they did not intend to suggest that financial interests acquired before an entity achieves "network" status should be divested upon meeting the definition threshold.[181] Thus, their proposed modification would not disrupt the expectations of parties under arrangements contracted prior to the time the entity attains network status. Chris-Craft/Tribune et al. contend that Fox has not provided any reason for exempting an emerging network from the restrictions on active syndication of programs that a new network begins syndicating after it attains network status.[182] In addition, Chris-Craft/Tribune et al. believe that Fox misinterprets the intent of their reference to the 40 percent cap. They suggested only that the rules afford considerable latitude so that it would not be burdensome for an emerging network to comply with the rules they propose.

93. Decision. In the Report and Order, we recognized that requiring immediate compliance with the revised rules after meeting the definition threshold may cause hardships to emerging networks. In particular, new networks may have entered syndication contracts concerning not only their

---

180 Fox Opposition at 3-5; Fox Affiliates Opposition at 8-14. The Fox Affiliates believe that the transition rules do not go far enough for PTAR. They propose that contracts for the exhibition of off-network programming in prime time entered into by a new network's affiliates before it reaches that status should be grandfathered for the life of the contract. Life of contract grandfathering is needed, according to the Fox Affiliates, to allow informed business decisions.

181 Chris-Craft/Tribune et al. state that if their proposed language did not clearly convey their proposal it can be modified to do so.

182 Chris-Craft/Tribune et al. at 6-8.

programming, but involving other networks as well. We also emphasized that all networks should operate according to the same set of rules. We affirm the Report and Order's grandfathering provision for "new" networks. We continue to distinguish between contracts negotiated before and after an entity reaches "network" status because we do not desire to penalize new networks and their affiliates by forcing them to terminate contracts arranged when they were not subject to the rules. Further, we find that requiring immediate compliance with the rules upon meeting the network definition criteria would contradict our goal of increasing the number of competitive networks. We also believe that the "grandfathering" period will promote an orderly transition to the new rules without undermining the policy goals of the new financial interest and syndication rules and PTAR. Finally, in response to Chris-Craft/Tribune et al., we note that although networks may now syndicate up to 40 percent of their prime time schedules as well as non-prime time and non-entertainment programs, this provision pertains to future programming and should not attempt to balance hardships created by terminating past contractual agreements.

94. Programs Covered by Grandfathering. Chris-Craft/Tribune et al. also assert that the rules should provide that program series broadcast for less than two years before an entity becomes a network is "network programming" even if the series is distributed before the entity becomes a network.[183] Petitioners believe that this will prevent a network from prematurely syndicating a series as it approaches the network definition criteria to evade the rules.

95. Fox argues that this proposal contradicts our stated intent to avoid premature application of the rules.[184] Fox asserts that this requirement would force divestiture of ownership interests that may have been acquired by a potential network well in advance of meeting, or even knowing that it would meet, the new definitional benchmarks. Fox argues that this proposal would deter new network entry and discourage participation by emerging networks in the financing and development of programming in the years before they anticipate achieving network status.

96. Decision. We reject the Chris-Craft/Tribune et al. proposal to apply the rules to program series broadcast for less than two years before an entity reaches "network" status. We believe that this limitation would create a disincentive for entities to meet the network definition criteria, thus limiting entry of competitive networks as well as reducing the willingness of emerging networks to finance and develop programming as they approach the definition threshold. We find that the Chris-Craft/Tribune et al. concern regarding the "premature" syndication of series is unwarranted because the distribution of such programming, if viable, will only increase the programming available for syndication. The public will benefit from additional desirable programming, or else stations will reject programs that do not yet appear to be viable for syndication.

---

183 Chris-Craft/Tribune et al. Petition at 16-17. Chris-Craft/Tribune et al. state that this change can be made by adding a note to Section 73.658(k).

184 Fox Opposition at 5-7.

97. Application of Safeguards to Grandfathered Programs. Chris-Craft/Tribune et al. further request a clarification that when an entity achieves network status, the network and any independent syndicator of its programs must comply with the affiliate favoritism and warehousing safeguards immediately, even for programs that are otherwise grandfathered.[185] They argue that there is no reason for a new or existing network to discriminate against non-affiliates or to warehouse programming in order to honor its contractual commitments or to avoid disrupting expectations of others. In their reply, Chris-Craft/Tribune et al. note that no parties objected to this proposal.

98. Decision. We clarify that an entity that becomes a "network" according to the Report and Order's definition must immediately comply with the safeguards against warehousing and affiliate favoritism in the conduct of syndication, even for programs that are otherwise grandfathered as to the retention or acquisition of syndication rights. In this regard, we concur with Chris-Craft/Tribune et al. that there is no reason not to require such entities to comply with these safeguards. We note that we do not anticipate that this requirement will abrogate existing contractual provisions.

## IX. Reporting Requirements

99. Rule. Each network must place reports in the public files of each of its O&Os semi-annually which certify compliance with our rules.[186] These reports must provide the following information for the preceding 180-day period: (1) the identity of prime time entertainment programming exhibited on any television network in which the network holds or acquires financial interests or syndication rights;[187] and (2) the identity of all programs that the network has syndicated and all domestic television stations to which syndicated program sales have been made.[188] A network also must place in its O&O files a copy of FCC Form 394 for each program aired on its network for which it acquires a continuing financial interest or syndication rights, therein certifying that licensing and network exhibition were not conditioned on acquisition of such rights.[189] In addition, on our request, the networks must provide us with a copy of any program agreements containing financial interest or syndication rights or syndication sales contracts.

---

185 Chris-Craft/Tribune et al. Petition at 17-18. Petitioner believes that this may have been our intent in stating that "[n]ew networks are otherwise required to comply immediately with these rules, in particular as to any program ownership rights obtained subsequent to becoming a 'network'." Report and Order at 3152.

186 47 CFR § 73.661.

187 47 CFR § 73.661(a).

188 47 CFR § 73.661(b).

189 47 CFR § 73.661(c).

100. Certification and Reporting Requirements. INTV recommends expanding the reporting requirements to cover any programming in syndication in which a network holds or has held a financial interest or syndication rights, even if the network is not the syndicator.[190] INTV states that reports should be required to identify the syndication sales of such programs because the independent syndicator of programs in which the networks have a financial interest are also subject to the affiliate favoritism rules. INTV also proposes that the rules require making any agreement that transfers syndication rights to an independent syndicator available on our request, thereby enabling us to determine whether the network exerts any control or influence over syndication of that program.[191]

101. INTV further urges that the networks certify compliance with the affiliate favoritism rules.[192] It suggests that a network be required to certify that: (1) it has no agreement with an independent syndicator that would permit it to exert influence over the syndication of a program in which it holds a financial interest or syndication rights; (2) the contract which transfers syndication rights to an independent syndicator or the network exhibition contract with the producer includes terms insulating the syndicator of the program from network influence over the syndication of the program; (3) the network has complied with the terms of the agreement; and (4) the network has not favored its O&Os or affiliates if it is the syndicator of the program. INTV believes this requirement will prevent network manipulation of the syndication marketplace that could harm independent stations.

102. Decision. We reject INTV's proposal to expand the reporting requirements covering any syndicated programming in which a network holds or has held a financial interest or syndication right, even if the network is not the syndicator. We emphasize that the information requested by INTV could be provided only by the syndicator. Thus, a network attempting to comply with such a requirement would have to obtain reports of the "independent" syndicator's activities, which could in fact undermine the syndicator's genuine independence.[193]

103. In addition, we believe it is unnecessary to adopt an additional rule to require that networks make available to us any agreements that transfer syndication rights to an independent syndicator. We believe that Sections 73.661 (a) and (b) of the new rules and our general authority under the Communications Act provide us with ample authority to obtain any information needed for enforcement of these rules. We can obtain such information from

---

190 INTV Petition at 19-20.

191 47 CFR § 73.661(a).

192 INTV Petition at 21-22. INTV supports adoption of a form similar to FCC Form 394 for this purpose.

193 We note that we rejected these proposals raised by INTV earlier in this proceeding. Report and Order at 3154.

networks or others as is necessary for our review of the syndication market's performance.

104. Finally, we believe it is also unnecessary to clarify our rule and adopt the specific certification requirements suggested by INTV. The certification form indicates that the certifying party has complied with the requirements of the financial interest and syndication rules and that no financial interests or syndication rights were obtained as a condition of the network licensing or airing of the programs. Section 73.660 of our rules implicitly imposes affiliate favoritism and anti-warehousing requirements both on networks and their independent syndicators. In situations where the networks are prohibited from actively syndicating programs, they must transfer their syndication rights to an independent syndicator, which, by definition, implicitly requires that the network: (1) has no agreement to influence an independent syndicator; and (2) has not favored owned or affiliated stations in syndicating its own programs. We emphasize that the networks must comply with these rules in order to protect and enhance competition and diversity in the syndication marketplace.

## X. Review of Residual Rules

105. We indicated in the Report and Order that we would review the financial interest, syndication, and production limit rules four years after their July 8, 1991, effective date.

106. INTV suggests postponing the review of the syndication rules at least one additional year[194] because at least five years are needed to provide enough information for evaluating their effectiveness. INTV observes that the first programming covered by the new financial interest and syndication rules will air in the fall of 1991 and would be syndicated for the first time in 1995. INTV observes that the stations acquiring exhibition rights for these programs (except for in-house productions subject to a reporting requirement) will not be known until 1995, so that we will not have sufficient data for the planned review. Chris-Craft/Tribune et al. support the INTV proposal as an appropriate response to the networks' claim that they will not be able to syndicate much programming before the intended review.

107. Decision. In the Report and Order, we declined to adopt a "sunset" of the rules based on our view that such a mechanism requires that we forecast the future of a business that is inherently unpredictable. We also recognized the dynamic nature of the program acquisition and syndication markets and observed that the intricate workings of these markets require that we undertake a full review at some future date. In this case, we chose four years as the appropriate time frame to observe the operation of these markets under the new rules. INTV's contention that the data on network syndication market practices available for us to review at that time will be inadequate is speculation. As we have indicated, the industries involved are in transition. Given the speed

---

194 INTV is not seeking to delay the planned review of any other aspect of the rules. INTV Petition at 23.

with which developments are taking place, we see no reason to delay commencement of the scheduled rule review. The fact that significant network involvement in the syndication market, with its associated public interest concerns, may be limited in the near term provides no basis for a delay in reviewing other developments that may have taken place in the interim. Indeed, possible network syndication of programs aired outside prime time or in-house prime time movies, as well as a network's early syndication sales of its prime time series programming, should provide a basis for review of active network syndication.

## XI. Administrative Matters

### Regulatory Flexibility Act

108. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the Report and Order detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

### Ordering Clauses

109. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the Association of Independent Television Stations, CBS Inc. and National Broadcasting Company, Inc., the Coalition to Preserve the Financial Interest and Syndication Rule, Chris-Craft/Tribune et al., Orbis Communications Inc., the Program Producers and Distributors Committee, and Press Television Corporation ARE GRANTED to the extent indicated herein and are otherwise DENIED.

110. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 4(i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(a), 310, 312, 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4(i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(a), 310, 312, 313 and 314, Part 73 of the Commission's rules and regulations, 47 CFR Part 73, IS AMENDED as set forth in the attached Appendix B. The rules will go into effect 30 days after publication of this Memorandum Opinion and Order in the Federal Register.

111. For further information, contact Marcia Glauberman, (202) 632-5414, James Coltharp or Scott Roberts, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX A

### Parties Filing in Reconsideration Proceeding

Petitions for Reconsideration

Association of Independent Television Stations, Inc. (INTV)
CBS Inc. and National Broadcasting Company, Inc. (CBS/NBC)
Coalition to Preserve the Financial Interest and Syndication Rule (Coalition)
Chris-Craft/United Television Station Group, Tribune Broadcasting Company, Gaylord Broadcasting Company and Channel 50 TV Corp. (Chris-Craft/Tribune et al.)
Orbis Communications Inc. (Orbis)
Program Producers and Distributors Committee (PPDC)
Press Television Corporation (Press)

Oppositions to the Petitions for Reconsideration

INTV
Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. (Joint Network)
Coalition
FBC Television Affiliates (Fox Affiliates)
Fox Broadcasting Company (Fox)
Chris-Craft/Tribune et al.
PPDC
King World Productions, Inc. (King World)

Replies to Oppositions

INTV
CBS/NBC
Coalition
Chris-Craft/Tribune et al.
Select Media Communications, Inc.
Sports Legends, Inc.

## APPENDIX B

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Section 154, 303

2. Section 73.659 is amended by revising paragraph (a)(3) to read as follows:

Section 73.659 Television network financial interests and syndication rights in programs.

(a) * * *

(3) The program or series is a co-production between the network and a domestic production entity where such co-production arrangement (i) was initiated, in writing, by the outside production entity and (ii) may be nullified by the outside production entity during the thirty (30) day period after it is executed and before it becomes binding;

* * * * *

3. Section 73.660 is amended by revising paragraph (a) to read as follows:

Section 73.660 Television network participation in program syndication.

(a)(1) No television network may syndicate any prime time entertainment programs to stations within the United States: (a) the syndication rights to which have been acquired pursuant to the provisions of Section 73.559(a)(4); or (b) that has not previously been aired on its network. Such programs shall be syndicated domestically through an independent syndicator.
(2) No television network may syndicate any first-run non-network programming to television stations within the United States. Such programs shall be syndicated domestically through an independent syndicator.

* * * * *

4. Section 73.662 is amended by revising paragraphs (c), (e), and (h) to read as follows:

Section 73.662 Definitions for television network financial interest, syndication, and prime time access rules.

For purposes of Sections 73.658(k), 73.659, 73.660, and 73.661:

* * * * *

(c) a "domestic production entity" is a production entity registered to do business in the United States, whose principal production headquarters is located in the United States, and that is not owned or controlled by the television network with which it seeks to co-produce.

* * * * *

(e) a "foreign production entity" is a production entity that is registered to do business outside of the United States and whose principal production headquarters is located outside of the United States.

* * * * *

(h) a program "solely produced by a network" is a program in which the network, directly or through a production entity it owns or controls, is the sole copyright owner, has full financial responsibility and full business and production control.

* * * * *

5. Section 73.3526 is corrected by revising the reference in the first sentence of paragraph (a)(11) from Section 76.661 to Section 73.661 to read as follows:

Section 73.3526 Local public inspection file of commercial stations.

(a) * * *

(11) Every television broadcast station owned or controlled by a television network shall maintain the records required by Section 73.661. * * *

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON

OFFICE OF
THE CHAIRMAN

**STATEMENT OF CHAIRMAN ALFRED C. SIKES ON EVALUATION OF THE SYNDICATION AND FINANCIAL INTEREST RULES (MM DOCKET NO. 90-162)**

When the decision in this proceeding was announced in April of this year, I dissented.

I had hoped at the beginning of this proceeding that we would take a fresh look at the networks and the role they play in today's media marketplace. I had hoped that we would discard long-standing myths and make an accurate assessment of network power based on 1990, not 1970, realities.

In my view, the majority's initial decision fell far short of this goal. The uncontroverted evidence revealed sweeping changes over the last two decades and detailed the networks' decline and the proliferation of competition in the television industry. Yet, the majority concluded that the networks -- alone among all other entertainment companies -- should continue to be shackled by even more intricate government regulations in their program acquisition and syndication activities. This decision flew in the face of the Administration's conclusion, set forth succinctly in the President's Economic Report, that "[g]overnment restrictions on ownership, carriage or syndication of programming inhibit competition, reduce efficiency, and are generally an ineffective means of addressing any market power that may exist in these markets."

Unfortunately, the reconsideration order adopted today does not remedy any of the initial decision's shortcomings. Indeed, in some respects, the order only tightens government's grip on the networks and further complicates the intricate web of fin/syn regulation.

I do not, however, want to get immersed in the details of today's decision. Rather, I would like to focus on the bigger issues at stake.

The importance of the television networks to our free broadcasting system and to the American public has been confirmed repeatedly in recent months. Beginning with the fall of the Berlin Wall, the three major networks have interrupted their commercial programming countless times in order to keep the nation abreast of rapidly-breaking news developments. Most recently, they carried the President's nationwide address on nuclear disarmament and the confirmation hearings of Justice Thomas.

Broadcasting these important public events is not cheap. On October 15, the Wall Street Journal reported that the three major networks lost $15 to $20 million in advertising revenue in carrying the Thomas hearings alone. To state the obvious, it is this advertising revenue which almost exclusively underwrites the opportunity for every man, woman, and child in America to see these significant events -- free of charge.

Yet, as the networks seek to redefine and redirect their future, they are held hostage by laws that are as outdated as those that protected AT&T's monopoly. Many of the laws we are dealing with today were enacted more than two decades ago, when the networks, combined, enjoyed roughly a 90 percent audience share and were virtually the sole source of commercial television for American viewers. The laws which keep the networks out of cable are over 20 years old. The laws which restrict their station ownership were first formulated in the early 1940s. The cable compulsory license -- which compromises broadcasters' property rights and subsidizes their principal competitor -- was enacted in 1976. And, of course, the fin/syn rules which now live on were first enacted in 1970 -- light years away from today's video market realities.

With the adoption of today's decision, this proceeding is brought to a close. The fate of the new regulations now rests in the hands of the courts. However, our work on the core questions surrounding the future of broadcasting continues. In the coming months, we will be faced repeatedly with the task of discerning the truth about the television networks and their place in the broadcasting industry. As we do so, we must be ever-vigilant not to let outdated notions about the broadcast market cloud our vision and lead us to erroneous results. The challenges we face in crafting an appropriate regulatory environment in this era of change are outweighed only by the challenges the networks -- and all broadcasters -- face as they confront an uncertain present and future.

**Separate Statement of Commissioner James H. Quello, Dissenting to the overall result, and concurring in part.**

**In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162.**

Bill Cosby, it appears, knows something that the majority of FCC Commissioners do not.

Mr. Cosby is launching a revival of the Groucho Marx game show, *You Bet Your Life*, and apparently is not convinced by the majority's conclusion in this proceeding that the networks hold a "unique position in the distribution of American television programming."1 He has chosen to distribute the program in first-run syndication rather than opt for a choice spot on a network schedule.

"You don't have to be a business genius to see what's coming," Mr. Cosby reportedly has said. "I don't think any business people with any independence are now looking at only the Big Three."2

I will not speculate on the presence or absence of "business geniuses" in government. Suffice it to say that the latest incarnation of financial interest and syndication ("finsyn") rules continues to focus exclusively on the "Big Three."

Of course, it is by now old news that the "Big Three" are not so big any more. Even the majority acknowledges the fundamental reorientation of the video marketplace.3 In response to this undeniable fact, they offer a new set of rules binding the networks that they call "prudent deregulation."4 But whether this scheme can be considered deregulatory is determined not by the relative restrictiveness of rules adopted over two decades ago, but by the demonstrated need for the rules *today*. Thus, as a matter of both constitutional law and sound policy, the Commission has the burden to justify any continuing rules.

In this regard, neither time nor repetition has improved the record support for finsyn rules. In fact, the majority notes that the petitions for reconsideration "present no new evidence that warrants reconsideration" of the *Report and Order*. *Reconsideration Order* at ¶ 11. This means there is "no new evidence" to support the majority's conclusions regarding network market power upon which the continuing rules are based. The problem is, there is no evidence — old or new — that justifies the majority's new regulatory regime.

The word "extraction" is used repeatedly in both the *Report and Order* and the *Reconsideration Order*, but a reviewing court will be hard pressed to find any evidence in the record to justify the majority's reliance on it. As I pointed out in my initial dissent, the only tangible evidence of extraction is that of successful producers extracting concessions from the networks. *Report & Order*, 6 FCC Rcd. at 3225-27.

Ruling out any reliance on current examples, it is difficult to know how to evaluate the majority's speculation regarding network extraction. The only credible economic data supports the conclusion that the networks lack such power.5 Even the majority did not take seriously the the economic studies submitted by the production community that purported to show network market power,6 preferring instead to draw support from their own "expertise," "understanding of the programming world" and other intuitive factors.7 With all due respect, such considerations cannot conjure record support where none exists.

This, of course, is all history. I mention it only because it lends some perspective to the *Reconsideration Order*'s "clarifications." That is, the record does not support the majority's continuing rules even when designed to curb network leverage that exists due to control over the prime time schedule, purportedly the zenith of network market power. Ironically, however, the clarifications highlight the fact that the most restrictive measures in the new rules apply to situations in which networks have the least power.

A few examples illustrate this anomaly.

**Syndication Activities**

Despite the majority's focus on the networks' "historical structural advantages," such as "longstanding affiliate distribution

system[s]," the *Report and Order* allows the networks the most freedom to engage in syndication activities precisely when they exploit those advantages.8 In other words, the networks are allowed to engage in direct syndication actvities for prime time programs produced "in-house" or for network programs carried in other dayparts. But as this *Reconsideration Order* clarifies, the networks are prohibited from engaging in active syndication of first-run programming. *Reconsideration Order* at ¶¶ 76-81. Unlike the rules relating to network shows, this restriction applies both to prime and non-prime time programming. *Id.* at ¶ 84.

Why do the new rules impose the most significant syndication limits when networks are not using the strength of their prime time schedules or their affiliation agreements? The majority attempts to support these restrictions by pointing to the pattern of network station ownership. *Id.* But as I noted out in my previous dissent, owning stations in major cities is not unique to the networks.9 Moreover, the rule strangely assumes that networks have greater leverage over their affiliates for transactions that are separate from the usual network-affiliate contracts. In the end, the majority fails to articulate a policy concern that could not be remedied by a simple prohibition of affiliate favoritism.10

Ultimately, it is clear that the ban on first-run syndication has but a single effect — it will keep the networks out of the market for the three or four years it will take for off-network shows to mature into syndicatable properties. Other than the understandable desire of existing syndicators to avoid competition, the record contains nothing to support such protectionism. Bill Cosby's move from network television to first-run syndication, for example, has been cited as evidence of "the shift of economic power toward syndication."11 Such opportunities are not limited to the major stars. Michael King of King World has been quoted as saying that "[f]or a new, up-and-coming, bright, smart group of people, there are more places to get your show to the public than ever before . . . and when you get your show in front of the public, you can hit a nerve."12

If anything, the record demonstrates that the syndication market could use some new competition. As I have noted previously, "the behavior of current syndicators suggests to me that the market would benefit from having a larger number of competitors." *Report and Order*, 6 FCC Rcd. at 3237. For example, Roger King, Chairman of King World reportedly said of his company, "[w]e ruled the 80s . . . and now we're locked in halfway through the '90s."13 Barring a reasonable decision in this proceeding by the Court of Appeals, Mr. King probably should add a few years to his estimate.

But the new regulatory regime bars not only the networks from joining the competition. It also has the perverse effect of strangling small independent syndication companies. It does so with its "clarification" that programming "from a national network" under the Prime Time Access Rule includes shows produced at networks or their owned and operated stations but distributed by an independent syndicator. *Reconsideration Order* at ¶¶ 86-88.

Before this clarification, first-run programs produced by networks or their owned stations were not considered network programming under PTAR so long as they were distributed by an independent syndication company.14 As noted in the Comments of Sports Legends, Inc.,

> Small companies like [ours] already have a difficult time competing against the large syndicators that dominate the first-run market. For example, in May, 1991 Sweeps, King World had 27% of the market, Paramount 13% and Buena Vista (Disney) 11% (Paul Kagan Assoc., TV Program Stats, July 13, 1991 p.4). It will be even harder for us to compete if potential sources of programs for our sales portfolio are effectively foreclosed by the Commission's new interpretation of PTAR.15

The Mass Media Bureau apparently shared the independent syndicators' concerns. Last August, it grandfathered the Commission's prior interpretation of the rules to prevent causing "an adverse effect on existing programs."16 Unfortunately, the majority did not share this concern with respect to future programs, thereby making the world safe for the major syndicators.

Finally, the majority clarifies that the new rules bar a network from actively syndicating programs that are produced for another network's schedule. *Reconsideration Order* at ¶ 61. Again,

this restriction applies to situations in which the networks do not have the leverage gained by virtue of controlling access to the prime time schedule. The majority suggests, however, that allowing active syndication could result in network control over a large share of the off-network programs in syndication. *Id.*

But this unsupported fear could only occur after four or more years after the network aired a sufficient number of episodes for successful syndication. Even then, there would be a problem only if the networks buy each other's best programs — a dubious assumption in a highly competitive market. Additionally, the networks would have to produce hits in sufficient quantities to make inroads into a market that now belongs exclusively to the studios and other syndicators. Since even the majority recognizes that "it is virtually impossible to tell at the outset whether a proposed program will become a 'hit,'" *Reconsideration Order* at ¶ 36, it is difficult to envision a strategy by which the networks could dominate the market.

It is not difficult to envision, however, the many ways in which the majority's plan of regulation continues to protect entrenched players in the syndication market.

General Restrictions

The majority purports to reduce regulation of the networks to focus only on areas of residual market power. But the new rules fail utterly to account for marketplace realities. As I previously pointed out, most prime time series are produced by major studios and that their market share is increasing. *Report and Order*, 6 FCC Rcd. at 3226-27. This fact gives the studios enormous power over the networks. *Id.*

The majority all but concedes this point, but asserts that the new rules are designed to assist "new, untried producers who have not yet created a successful network program." *See, e.g., Report and Order*, 6 FCC Rcd. at 3112-13. Unfortunately, the rules are not written that way. They protect huge multinational conglomerates to the same extent as independent first-time producers. But the fact is, the multinational conglomerates are in the majority.

It is a strange variation on Anatole France's famous maxim that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." In this case, the "majestic equality" of the finsyn rules offers government protectionism to both the poor and the incredibly rich.

One effect of the new regulations is to restrict the networks' ability to structure multi-project arrangements with successful producers. Because of the 30-day "cooling off" period for outside productions, the networks cannot negotiate for back-end rights when they enter a multiple-series deal unless they agree to license all of the shows at the outset. This regulatory micro-management of the contracting process will limit the networks' ability to bid for the talent they need in order to compete.

The majority acknowledges that "these agreements are generally made with producers with relatively strong bargaining power," but concludes that "even established producers can find themselves at a distinct disadvantage in initial licensing negotiations" primarily because no one knows "at the outset whether a proposed program will become a 'hit.'" *Reconsideration Order* at ¶ 36. This analysis, however, has it exactly backwards. The inability to predict hit programs does not limit the bargaining power of successful producers — it expands their leverage. It explains how networks end up with shows like *Cop Rock*.

Conclusion

If the *Reconsideration Order* clarifies anything, it is that this complex new regulatory scheme is difficult to apply, extremely one-sided and, ultimately, anticompetitive. I had hoped that the majority would use this opportunity to truely reconsider the *Report and Order*, rather than leave that task to the Court of Appeals.

That being said, I can support the *Reconsideration Order* in that it rejects demands to adopt even more onerous restrictions on the networks' ability to participate in the programming market. Therefore, I concur in limited part. But I dissent to the extent the *Order* reaffirms the new regulatory regime governing financial interests and syndication rights.

## Footnotes

[1]*In the Matter of Evaluation of the Syndication and Financial Interest Rules, Report and Order*, 6 FCC Rcd. 3094, 3109 (1991) ("*Report and Order*"). In a sense, however, the majority is correct that the networks hold a "unique position" in the video marketplace. Unlike cable and syndication, the networks are in decline. Of course, cable and syndication are not the only competition; networks also compete among themselves. This week, for example, Carsey-Werner Co. announced that it is moving the series *Davis Rules* from ABC to CBS. ABC agreed to release Carsey-Werner from its contractual commitments. Carmody, *The TV Column*, WASHINGTON POST, November 19, 1991 at C6. *See also Report and Order*, 6 FCC Rcd. at 3225-26 (dissenting statement).

[2]Carter, *Cosby Sidesteps Networks in Big TV Deal*, NEW YORK TIMES, October 28, 1991 at D1; Carter, *For Cosby, It's No Secret The Word Is Syndication*, NEW YORK TIMES, November 3, 1991 at F14. The economic benefits of this choice are clear. The syndicated sales of "The Cosby Show" have been estimated at $1 billion. No network could begin to match this amount of money in a programming deal. Indeed, the $1 billion total exceeds the combined networks' profits for the past several years.

[3]*Report and Order*, 6 FCC Rcd. at ¶¶ 24, 36; *Reconsideration Order* at ¶ 4.

[4]*See* Statement of Commissioner Sherrie P. Marshall, *FCC Reaffirms Relaxation of Financial Interest and Syndication Rules With Minor Clarifications*, Report No. DC-1974 (October 24, 1991).

[5]For an excellent discussion of the economic issues contained in the record, see Chairman Sikes' dissent to the *Report and Order*. 6 FCC Rcd. at 3174-89.

[6]*Report and Order*, 6 FCC Rcd. at 3134 n.125. Lacking any record support, the majority seeks to downplay the relevance of economic data. *See, e.g., id.* at ¶ 47.

[7]*Id.* at 3099.

[8]*Id.* at 3109. This is not to suggest that the somewhat greater freedom allowed networks in this regard is sufficient. I am saying only that this is a strange way for the Commission to demonstrate its concern about the so-called inherent market power of networks.

[9]*Id.* at 3237 n.112.

[10]The majority further asserts that the syndication limits are needed to protect the prime time access rule. But this justification does nothing to support a ban on non-prime time syndication sales.

[11]Carter, *Cosby Sidesteps Networks in Big TV Deal*, NEW YORK TIMES, October 28, 1991 at D1. According to Tim Duncan, executive director of the Advertiser Syndicated Television Association, there will be an 8 percent growth in syndication revenues next year. *Id.*

[12]Mahoney, *A King's-Eye View of the TV Market*, ELECTRONIC MEDIA, June 24, 1991 at 30.

[13]Mahoney, *'This Company is Just Really Beginning,'* ELECTRONIC MEDIA, June 24, 1991 at 30.,

[14]Comments of Sports Legends (filed August 16, 1991). See also Comments of Select Media Communications and LBS Communications.

[15]Comments of Sports Legends (filed August 16, 1991).

[16]*Studio 22*, 6 FCC Rcd. 5014 (Mass Media Bureau 1991). *See also Memories . . . Then and Now*, 6 FCC Rcd. 5013 (Mass Media Bureau 1991) ("the Commission did not intend actions taken therein to adversely affect syndication arrangements already entered into").

October 24, 1991

**Statement of**
**Commissioner Sherrie P. Marshall**

Re: FISR Reconsideration

It seems quite fitting that the Commission should reaffirm our relaxation of the financial interest and syndication rules on the same day that we propose to allow telco delivery of cable television.

Today's cable-telco decisions clearly confirm this Commission's refusal to allow private interests to limit our policy decisions to the polar extremes of either clinging to old rules or completely blowing them up. Indeed, our unanimous decision on the difficult issue of telco delivery of cable television demonstrates, yet again, that prudent deregulation often requires substantial rules relaxation and carefully tailored safeguards, rather than flash-cut repeal.

And that was the same conclusion a majority of this Commission reached last April, when we adopted the fin/syn order we reaffirm and clarify today.

The production, distribution, and independent television station communities demanded continued safeguarding of their critical contributions to the diversity of U.S. television programming. And we heeded that demand, but not by clinging to unnecessarily broad prohibitions on network productions and investment opportunities.

Similarly, we heeded the demand of the broadcast networks and their affiliates for new revenue streams and business opportunities to offset their declining audience shares. In so doing, however, we concluded that total repeal of the fin/syn rules would place the private interests of the broadcast networks above the public interest of the American viewer.

Thus, we chose to relax our financial interest and syndication rules -- carefully and substantially, but not in full.

Now the production, distribution, and independent TV station interests have reiterated their desires for more regulation, and network interests have reiterated their yearning for less. Today, however, with no fundamentally new evidence or arguments presented to us for reconsideration, we stand by our original decision. In our view, after a decision based on one of the most

extensive records ever considered by this Commission, the only changes warranted on reconsideration are a few minor clarifications and technical corrections that better conform our rules to the clear intent of our initial decision.

Accordingly, and notwithstanding the protestations of the respective private parties and their zealous advocates, we conclude this fin/syn proceeding having accomplished our goal: providing the networks with far-reaching new liberties while maintaining minimal safeguards to protect the diversity of programming the American viewing public expects and deserves.

# # #



*U.S. Government Printing Office: 1992 — 312-024/60009